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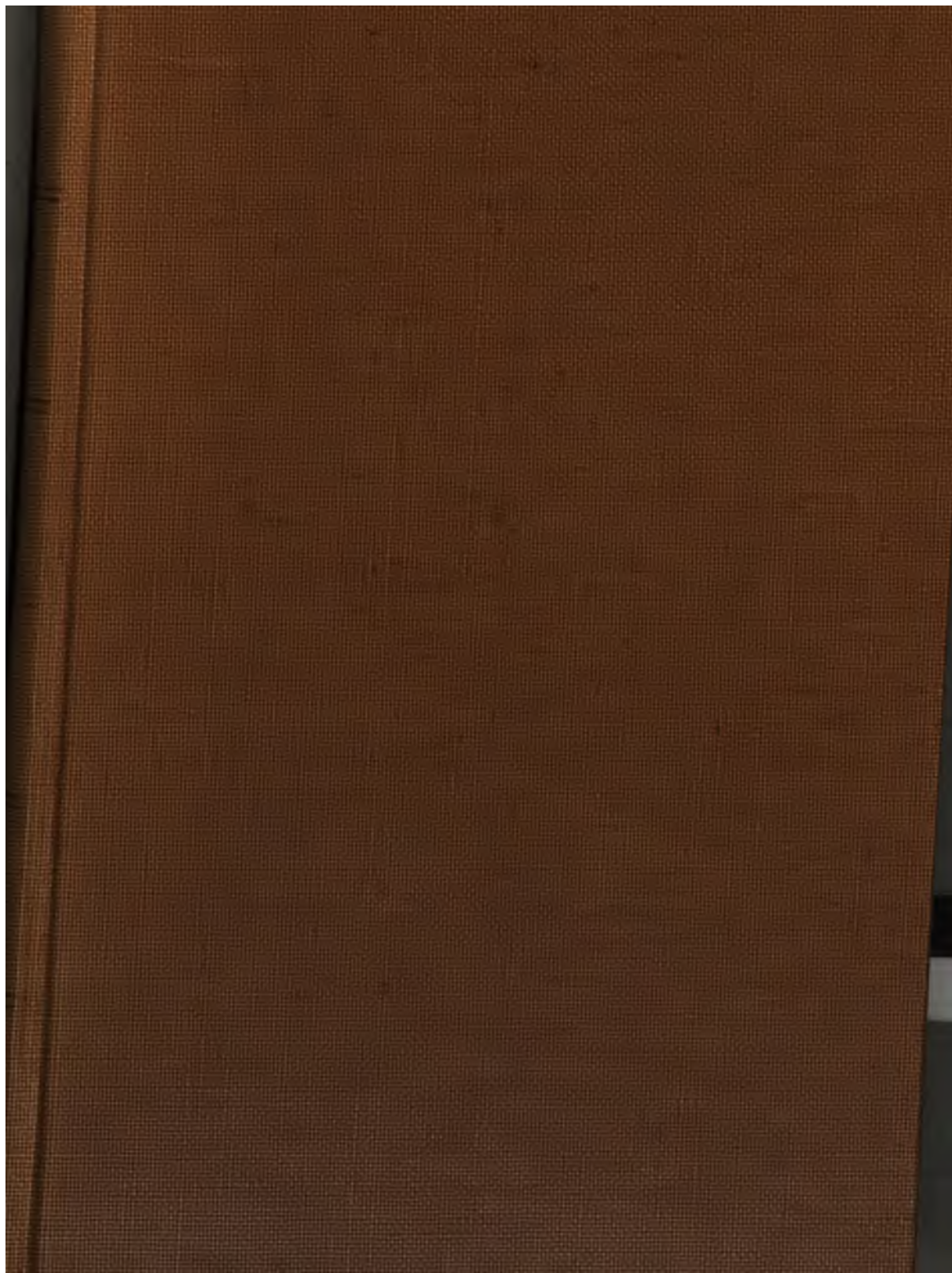
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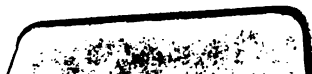
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# INSOLVENT ACT OF 1875.

AND

AMENDING ACTS.

ANNOTATED BY

SAMUEL ROBINSON CLARKE, ESQ.,

OF OSGOODE HALL, BARRISTER-AT-LAW.

---

*Maximum interpretationis juridicae mysterium.*

---

**Toronto:**

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1877.



Entered according to the Act of the Parliament of Canada, in the year of our Lord one thousand eight hundred and seventy-seven, by ROBERT CARSWELL, in the office of the Minister of Agriculture.

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## PREFACE.

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Two sessions of the Parliament of Canada have intervened since the enactment of "The Insolvent Act of 1875." The amending Acts of these sessions and the decisions of the Courts have so altered, added to, and explained the Act of 1875, that no apology is necessary for the appearance of this work. It was undertaken prior to the passing of the Act of 1875, and the subject of insolvency has received the special attention of the author since that time.

The amending Acts of 1876 and of 1877 will be found incorporated with the Act of 1875, the sections of the latter Act, in every case, are given to read as amended. It was deemed advisable to cite such of the American cases as are applicable to our Act; these have, accordingly, been brought down to the 1st of January, 1877. All the late English cases, down to and inclusive of April, 1877, have been given. In regard to the Canadian cases, the researches of the author have not extended further back than the 1st of January, 1864, but he believes that all cases on the subject of insolvency reported in Canada, from that date to the 1st of May instant, will be found in their proper places in the work.

Through the kindness of N. H. Meagher, Esq., of Halifax, and others, he has also been able to give several unreported cases of considerable importance.

The author regrets that no Rules of Practice have yet been framed in any of the Provinces except Quebec, and the rules of this Province were framed on the Act of 1864.

The Tariffs of Fees for the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick and Prince Edward Island will be found in the Appendix. In Manitoba, a tariff has not yet been framed; and at the time of going to press, the author had not heard from his correspondent in British Columbia.

The list of Official Assignees contains all appointments up to the 25th of April, 1877.

Yielding to the desire which seems to prevail in the profession for a full expression of opinion on the part of an author, I have in this work, in many instances, pronounced an opinion of my own, and have ventured, in some instances, to dissent from the conclusions of learned judges. I have endeavoured also to point out the cases which have been overruled, or are not now applicable. In these bold undertakings, I can scarcely expect that I have not made some mistakes, but I trust that the conclusions I have arrived at are, in the majority of cases, correct.

Those who have been of the opinion that the case of *Davidson v. Ross* (24 Grant, 22) has abolished the doctrine of "pressure," will, no doubt, attentively peruse the notes to the 133rd section of the Act. In fact, the doctrine of pressure is practically untouched by the decision referred to, except as to the 133rd section of the Act. The decision was, in brief, that "unjust preference" used in this section is not a synonym for "fraudulent preference." The doctrine of pressure still applies in all cases of fraudulent preference, and under the 56th section of the Act, fraud or fraudulent preference is a ground for withholding a discharge. I have, therefore, under the 133rd section of the Act, given all the cases in which the question of pressure arose, for they are explanatory of the doctrine of fraudulent preference. Where pressure establishes that the transaction is not voluntary, there cannot be a presumption of an intent to prefer, which is an ingredient in case of fraudulent preference.

TORONTO, 12th May, 1877.

## TABLE OF ABBREVIATIONS.

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A. L. J. ....	Albany Law Journal.
A. L. Reg. ....	American Law Register.
A. L. Rev. ....	“ “ Review.
A. L. T. ....	“ “ Times.
Ben. ....	Benedict's Reports.
Biss. ....	Bissell's Reports.
B. R. ....	Bankrupt Register, U. S.
Ch. Cham. ....	Chancery Chambers Reports, Ontario.
C. L. J. N. S. ....	Canada Law Journal, New Series.
C. L. N. ....	Chicago Legal News.
Grant ....	Grant's Chancery Reports, Ontario.
Hannay ....	Hannay's Reports, New Brunswick.
Lans. ....	Lansing, N. Y.
L. C. Gazette. ....	Local Courts Gazette, Ontario.
L. C. J. ....	Lower Canada Jurist.
L. C. L. J. ....	“ “ Law Journal.
L. C. R. ....	“ “ Reports.
L. T. B. ....	Law Times Bankrupt Reports.
Pitts. L. J. ....	Pittsburgh Legal Journal.
P. R. U. C. ....	Upper Canada Practice Reports.
Pugsley ....	Pugsley's Reports, New Brunswick.
Q. B. U. C. ....	Queen's Bench Reports, Ontario.
Russell & Chealey ....	Russell & Chealey's Reports, Nova Scotia.
Revue Critique. ....	La Revue Critique, Montreal.
Revue Legale. ....	“ Legale, Sorel.
Stephen's Digest ....	Stephen's Digest, New Brunswick, Reports.
S. C. ....	Same Case.
Taylor ....	Taylor's Reports, Ontario.
U. C. C. P. ....	Upper Canada Common Pleas Reports.
U. C. L. J. ....	“ “ Law Journal.
U. C. P. R. ....	“ “ Practice Reports.
U. C. Q. B. ....	“ “ Queen's Bench Reports.





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Bankruptcy proceedings are not to be  
used to put the receivers on debtors and  
never ought to be used where there  
is a bona fide dispute as to the  
debt claimed.

Ex parte Sawyer & Lowell.

42. N. Y. Rep. N. S. S. 532.

N. Y. Sept. 10. 1881. P. 1322.

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THE  
INSOLVENT ACT OF 1875,  
AND AMENDING ACTS.

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38	VICT.	CHAP.	16,	1875.
39	"	"	30,	1876.
40	"	"		1877.

**H**ER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

1. This Act shall apply to traders and to trading co-partnerships and to trading companies whether incorporated or not, except Incorporated Banks, Insurance, Railway, and Telegraph Companies.

The following persons and partnerships or companies, exercising like trades, callings or employments, shall be held to be traders within the meaning of this Act :—

Apothecaries, auctioneers, bankers, brokers, brickmakers, builders, carpenters, carriers, cattle or sheep salesmen, coach proprietors, dyers, fullers, keepers of inns, taverns, hotels, saloons or coffee-houses, lime burners, livery stable keepers, market gardeners, millers, miners, packers, printers, quarrymen, sharebrokers, shipowners, shipwrights, stockbrokers, stock-jobbers, victuallers, warehousemen, wharfingers, persons insuring ships or their freights or other matters against perils of the sea, persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail, and persons who, either for themselves or as agents or factors for others, seek their living by buying and selling or buying and letting for hire goods or commodities, or by the workmanship or the conversion of goods or commodities, or trees ; but a farmer, grazier, common labourer, or workman for hire shall not, nor shall a member of any partnership, association or company which cannot be adjudged insol-



vent under this Act, be deemed as such, a trader for the purposes of this Act. All such persons, co-partnerships, or companies having been traders as aforesaid, and having incurred debts as such which have not been barred by the Statutes of Limitations or prescribed, shall be held to be traders within the meaning of this Act; but no proceedings in liquidation shall be taken against such trader based upon any debt or debts contracted after he has so ceased to trade.

In reference to the time when an Act of Parliament takes effect, "The Interpretation Act" (31 Vict. chap. 1. s. 4) provides that the Clerk of the Senate shall indorse on every Act of the Parliament of Canada, immediately after the title of such Act, the day, month, and year, when the same was by the Governor-General assented to in Her Majesty's name. Such indorsement is to be taken as a part of the Act; and the date of such assent shall be the date of the commencement of the Act, if no later date be therein provided. The 148th section of the Act of 1875, however, fixed the first day of September, 1875, as the date for the commencement of the Act, except as to the appointment of official assignees, and the making and framing of rules, orders, and forms, to be followed and observed in proceedings under the Act, with respect to which the Act was declared to be in force from the time of its passing. The Act was assented to on the eighth day of April, 1875; therefore it has been in force since that date as to the appointment of assignees and the making of rules; but in other respects only from the first day of September, 1875.

The preamble of the Act indicates the authority by virtue of which it was passed (31 Vict. chap. 1, s. 1), and, in reference to bankruptcy and insolvency, the Parliament of Canada has, under the British North America Act, 1867, section 91, exclusive legislative power. There is nothing in the Act to show that the word "insolvency" is used in any other than the ordinary sense, viz.—general inability to pay all just debts. It was, therefore, held, in New Brunswick, that an Act which provided for the examination of a debtor before a judge, as to his ability to pay his debts and for his discharge from gaol or the limits, as to the suit for which he was confined, where his inability to pay was shown, and where he had made no fraudulent transfer or undue preference, was an

Insolvent Act which the Legislature of New Brunswick had no power to pass since the British North America Act, 1867, came in force; and that the assent of the Governor-General would not make it valid (*Reg. v. Chandler*, 1 Hannay, 548).

The Local Legislatures of the several Provinces have no jurisdiction in matters of insolvency, and if such a Legislature passes a law authorizing the compounding of a debt, such a law will be *ultra vires* and unconstitutional (*Belisle v. Union St. Jacques*, 15 L. C. J. 212; 1 *Revue Critique*, 118; see also *Crombie v. Jackson*, 34 Q. B. U. C. 575; re *Harrison*, 2 Pugsley, 11).

The Insolvent Act of 1864 only applied in the present Provinces of Ontario and Quebec. In the former, it applied to all persons, whether traders or not; but in the latter, to traders only. The Insolvent Act of 1869 applied to traders only, and it extended to the Provinces of Ontario, Quebec, New Brunswick, and Nova Scotia. The present Act applies to each and every Province in the Dominion of Canada. The former Acts contained no definition of the term trader, and the definitions in this Act are borrowed almost *verbatim* from the English Act of 1869.

The Insolvent Law is now made applicable to the estates of incorporated companies. Trading companies, whether incorporated or not, are subject to the provisions of the Act. Companies not incorporated for the purposes of trade, are apparently subject to its provisions. Under the 147th section of the Act all incorporated companies, not specially excepted in the first section of the Act, are liable to be placed in insolvency. The 147th section, being subsequent to the first, would control it (see *Potter's Dwaris on Statutes*, 118-158); and in express language it extends to all incorporated companies not excepted. The only excepted companies are Incorporated Banks, Insurance, Railway, and Telegraph Companies. Therefore, according to the strict wording of the Statute, all incorporated companies, except the foregoing, come within its provisions. It would seem, however, that it was not intended to have this extended signification; that it does not apply to religious, charitable, or municipal corporations, but only to trading corporations.

The persons designated traders by the Act are traders within

the Act, whether they are private individuals, partnerships or companies. A miner, for instance, as a private individual, is within the Act; an incorporated mining company, or partnership formed for mining purposes, is also within the Act. The procedure, however, in the case of the incorporated company is different from the case of a private individual or partnership; so a private banker would come within the ordinary provisions of the Act. An insolvent incorporated bank is, however, subject to special provision under the Act 39 Vict. chap. 31. This statute provides as follows:—

1. Notwithstanding anything contained in "The Insolvent Act of 1875," the provisions of the said Act shall apply to incorporated banks, subject to the modifications contained in the one hundred and forty-seventh section of the said Act, and to the following additional modifications which apply to the case of incorporated banks only.

2. No application for a writ of attachment against, and no assignment of the estate shall be made until after the bank has, whether before or since the passing of this Act, become insolvent by suspension of payment for ninety days, under the provisions of the fifty-seventh section of "An Act relating to Banks and Banking," passed in the thirty-fourth year of Her Majesty's Reign, chaptered five.

3. The judge may adjourn proceedings upon any application for a writ of attachment, for a time not exceeding six months from the time at which the bank suspended payment.

4. The judge may order that the preliminary inquiry authorized by the first sub-section of the said one hundred and forty-seventh section shall be made by a person or persons other than an official assignee, to be by him named on the application of the parties, and the person or persons so named shall have all the rights and discharge all the duties appertaining to the official assignee in connexion with such inquiry; and the judge may extend the time for report on such inquiry to a period not exceeding thirty days from the date of the order for inquiry.

5. Nothing herein, or in the said Insolvent Act, contained shall

be held to authorize the carrying on or continuing the business after the bank has become insolvent as aforesaid.

6. An incorporated bank may be appointed a receiver or creditors' assignee, and in case a bank is so appointed it may act through one or more of its principal officers to be approved by the judge.

7. The Receiver shall, in addition to the powers vested in him under the said hundred and forty-seventh section, have the powers vested by the fifty-seventh, fifty-eighth and fifty-ninth sections of the said Act respecting banks and banking in the "Assignee, or Assignees, or other legal authorities," in the said fifty-seventh section named.

8. After the issue of the writ of attachment the Assignee shall, in addition to the powers vested him under the Insolvent Act, have like powers to those given to the Receiver under the next preceding section of this Act.

9. Publication in the *Canada Gazette*, and in one newspaper issued at or nearest the place where the head office is situate, of notice of any proceeding of which, under the Insolvent Act, creditors should be notified, shall be deemed sufficient notice to holders of notes of the bank intended for circulation.

10. It shall be the duty of the Assignee to ascertain as nearly as may be the amount of notes of the bank intended for circulation and actually outstanding, and to reserve until the expiration of at least two years after the bank has become insolvent, or until the last dividend, in case that is not made till after the expiration of the said time, dividends on such part of the said amount in respect of which claims may not be filed; and if claims have not been filed and dividends applied for in respect of any part of the said amount before the period herein limited the dividends so reserved shall form the last or part of the last dividend.

The Act of 1869 did not, as we have already seen, extend beyond traders; but, under this term, trading co-partnerships were included. By trading co-partnerships are meant mercantile or trading firms; for instance, partnerships composed of professional men, as barristers or physicians, are not trading co-partnerships, but a firm composed of several persons associated in partnership for the purpose of trade is a trading co-partnership. The dis-

inction between trading co-partnerships and unincorporated trading companies, to which the Act applies, is, that a partnership consists of a few individuals known to each other, bound together by ties of friendship and mutual confidence, and who, therefore, are not at liberty, without the consent of all, to retire from the firm and substitute other persons in their places ; whilst a company consists of a larger number of individuals, not necessarily acquainted with each other at all, so that it is a matter of comparative indifference whether changes amongst them are effected or not (Lindley, on Partnership, 3rd Ed., 4, 5). Unincorporated trading companies are, generally, formed by agreement ; and they differ from corporations in this : That the rights and obligations of the individuals composing the latter are not the rights and obligations of the fictitious person composed of those individuals ; nor are the rights and obligations of the body corporate exercisable by, or enforceable against, the individual members thereof, either jointly or separately, but only collectively as one fictitious whole (ib. 4).

This first section of the Insolvent Act is couched in affirmative terms. A Statute made in the affirmative, without any negative expressed or implied, does not take away the common law. But if an affirmative Statute, which is introductive of a new law, direct a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner (Potter's Dwarrris on Statutes, 68-72).

The Insolvent Act, therefore, does not interfere with the common law, which may exist in any of the Provinces, as to the discharge of debtors, nor would it repeal, by implication, any Statute heretofore in force in any of the Provinces, for an affirmative Statute does not repeal an affirmative Statute, and if the substance be that both may stand together, they shall have concurrent efficacy (ib. 69).

A number of Statutes named in the 149th and 151st sections of the Act are, however, expressly repealed. This express repeal abrogates the Statutes named ; but the Act does not prevent a debtor from effecting a composition independently of its provisions by deed, at common law. In such case, however, the deed

will not have the statutory effect of a deed executed under the Act. The majority in number and three-fourths in value, cannot bind the non-assenting creditors (*Green v. Swan*, 22 C. P. U. C. 307). As the Act creates a new method for the administration of the estates of insolvent debtors, and for their relief from liability, the provisions of the Act must be complied with, in order that the debtor may be entitled to their benefit. A debtor, who assigns and comes within the Act, must look to the Act alone for his discharge, and he has no claim to exemption except in so far as the Act expressly declares he shall be discharged (see *Palmer v. Baker*, 22 C. P. U. C. 63 ; ex parte *Bejeau*, 2 Pugsley, 200).

Though this section uses no negative language, yet, for the reasons already named, persons not designated as traders cannot be brought within the Statute, for it is introductive of a new law, and it creates rights and remedies only in favour of the individuals to whom it applies.

It is a general and very sound rule, applicable to the construction of every Statute, that it is to be taken in reference to its subject matter. In this way often, the operation of general words may be limited. Thus the Stock-jobbing Acts in England are general, and their terms would apply to transactions in foreign stocks ; a construction, however, which the Courts have rejected, in obedience to the obvious intention of the Legislature that the provisions of these enactments are to apply only to British stocks (*Salkeld v. Johnston*, 1 Hare, 196 ; *Henderson v. Bise*, 3 Starkie, 158 ; *Wells v. Porter*, 2 Bing. N. C. 722 ; *Elsworth v. Cole*, 2 M. & W. 31).

For these reasons the writer is of opinion that the penal clauses of the Statute cannot be invoked against non-traders, to whom the Act does not apply, and, as we shall see hereafter, some of the clauses do not apply unless against a trader whose estate is being administered under the Act. Parties may, if they choose, wind up the estate of an insolvent debtor without having recourse to the machinery provided by the Insolvent Act ; and, if this is done, the provisions of the Insolvent Act will not apply to the case, for the Act only applies where an assignment is made, or writ of attachment issued, and proceedings taken thereunder.

If an assignment is made without reference to the Statute, none of its clauses as to fraudulent preferences can be invoked to make the assignment invalid (*Squire v. Watt*, 29 Q. B. U. C. 328; see also re *Baker*, 3 Ch. Cham. 499; see also, on the general question, *Prevost v. Drolet*, 18 L. C. J. 300.)

If two Acts are in *pari materia*, the second one being in effect amendatory of the first, a word in the second will not be presumed to be used in a different sense from that in which it is used in the first (*Robbins v. Omnibus R. R.* 32 Cal. 472). Ambiguous words are to be interpreted by comparing therewith the context, of the whole Statute, and by considering its reason, spirit and cause (*State v. Judge*, 12 La. Ann. 777); and the law is to be construed as a whole (*State v. Weigel*, 48 Mo. 29). It is not so much the abstract meaning of words which is to be regarded, but the sense in which they are used in the particular Statute, and this is to be ascertained from the context (*McIntyre v. Ingraham*, 35 Miss. 25). The whole Statute is to be so construed that all its provisions may be harmonized if possible (*Scott v. State* 22 Ark. 369); and incongruities are to be so construed as to harmonize with the general intent of the whole (*Commonwealth v. Conyngham*, 66 Penn. St. 99).

*Ex antecedentibus et consequentibus fit optima interpretatio* is one of the most important canons of construction. Every part of a Statute should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done; or, in other words, the construction must be made upon the entire Statute and not merely upon disjointed parts of it (*Hall v. Deshler*, 71 Penn. 299).

In the construction of the law the principle of uniformity must not be out of sight, for such construction ought to be put on a Statute as may best answer the intention the makers had in view (*Barstow v. Adams*, 2 Day, 70).

For the purpose of arriving at the legislative intent, all Acts on the same subject matter are to be taken together and examined in order to arrive at the true result, (Sedgwick on Statutes, 2nd Ed. 209); and this rule applies though some of the Statutes have been repealed (ib. 212). But where a Statute differs in its language

from a prior Statute on the same subject, it is an intimation that a different construction is intended (*Rich v. Keyser*, 54 Penn. St. 86); but, not where the change is one of phraseology merely (*Burwell v. Tullis*, 12 Minn. 572). A declaratory Act or an Act declaring the true intent of a previous Act does not control the judiciary in deciding on the true construction of the first Act, except in cases arising subsequent to the declaratory Act, or except in cases where a retrospective Act can properly be passed (Sedgwick on Statutes, 2nd Ed. 214). Under 40 Vict., s. 37, no amendment thereby made shall be held to be a declaration of the construction of any provision of the Insolvent Act of 1875, as applicable to any proceedings theretofore had under the Act (see also 39 Vict. chap. 30, s. 22).

Construction should lean towards personal liberty, and Statutes authorizing arrest are to be strictly construed (*Elam v. Rawson*, 21 Geo. 139; *Ramsey v. Foy*, 10 Ind. 493).

Statutes in derogation of the common law are to be construed strictly, and it has been said that Statutes exempting portions of a debtor's property from liability for his debts are in derogation of the common law, and not to be extended by an equitable construction; and it has been held that, where a Statute declared a *team* should be exempt from execution, this did not exempt the necessary food for them, although a previous Act of Exemption did exempt a cow and two swine and the necessary food (*Rue v. Alter*, 5 Denio, 119). But this doctrine has been relaxed in modern times, and these Statutes are now to be construed sensibly and with a view to the object aimed at by the Legislature, and accordingly it was held that a Statute exempting one cow from execution applied to the animal whether alive or dead (*Gibson v. Jenny*, 15 Mass. 205). Under "The Interpretation Act" (31 Vict. chap. 1, sec. 7, thirty-ninthly), "The preamble of every Act of Parliament shall be deemed a part thereof, intended to assist in explaining the purport and object of the Act, and every Act and every provision or enactment thereof shall be deemed remedial, whether its immediate purport be to direct the doing of anything which Parliament deems to be for the public good, or to prevent or punish the doing of anything which it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal con-



struction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment according to their true intent, meaning, and spirit. Fortiethly, nothing in this section shall exclude the application to any Act of any rule of construction applicable thereto, and not inconsistent with this section." (The application of the foregoing provisions to the Insolvent Act was recognised in *Cameron v. Holland*, 29 Q. B. U. C. 506; where a decision in accordance with these principles was rendered.)

And it would seem that the Insolvent Act is remedial, and should be liberally construed. It is not to be construed strictly as if it were an obscure or special penal enactment. The Act establishes a system, and regulates, in all their details, the relative rights and duties of debtor and creditor. It does not attempt to punish the insolvent, but to distribute his property fairly and impartially between his creditors, to whom in justice it belongs. It is remedial, and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew. Such an Act must be construed according to the fair import of its terms with a view to effect its object, and to promote justice (re *Locke*, 2 B. R. 382; re *Muller*, 3 B. R. 329; re *Silverman*, 4 B. R. 523; re *Ellis*, 5 Law Rep. 273.)

When an Act of Parliament has received a construction, either from long practice or from judicial interpretation, and is afterwards re-enacted in the same terms, the Legislature is deemed to have had that construction in view in the re-enactment (*Mansell v. Regina*, 8 E. & B. 54; *St. Losky v. Green*, 9 C. B. N. S. 370; ex parte *Campbell*, L. R. 5 Ch. 703; *Davidson v. Ross*, 24 Grant, 79 per Patterson, J.). This rule would apply to the sections of the Act which have been re-enacted in all cases where these sections have received the same construction in all the Provinces; but if the construction has differed in the different Provinces, the particular construction, which the Legislature had in view, could not be determined, and in such case the rule would not apply (*David-*

*son v. Ross*, supra, per Patterson, J.). Acts of Parliament are always presumed to be passed with a knowledge by the legislature of the then existing law, and of the decisions of the courts upon the matter which is the subject of legislation (*Crombie v. Jackson*, 34 Q. B. U. C. 580, per Wilson, J.).

There is nothing in the Act to show that the persons named in this section must be subjects of Her Majesty, and it is apprehended that the law applies to aliens and denizens resident in Canada in the same manner as in the case of subjects. The point has not been decided in Canada, though raised in the case of *Mellon v. Nichols*, 27 Q. B. U. C. 167.

In the United States, the Bankrupt Act speaks of persons "residing within the jurisdiction of the United States," and it is there held that resident aliens may take the benefit of the Act (re *Goodfellow*, 3 B. R., 452; s. c. *Lowell*, 510; *Cutter v. Folsom*, 17 N. H. 139).

The writer is of opinion that a trader not domiciled in Canada, who is nevertheless doing business, and has a place of business here, may obtain a discharge from his liabilities under the Act. In *ex parte Crispin*, L. R. 8 Ch. 374; 28 L. T. N. S. 483, the Court declared that it was the act of bankruptcy, being committed within the jurisdiction of the Court, that gave the jurisdiction, and they expressed the opinion that, if a foreign trader trades in England, and commits an act of bankruptcy there, he is subject to the bankrupt laws, and that it makes no difference that he is not a resident trader in England, or that his principal place of business is elsewhere. It would, therefore, seem that all persons, who carry on trade in Canada, are liable to be placed in insolvency, if they commit any of the acts which, under the third section, are declared to make a debtor insolvent, and that this liability attaches independently of the domicile or nationality of the trader (see also annotations to section 2 E).

Where a person neither *de facto* nor in contemplation of law, resides in England, it would seem that if he contracts debts during a temporary stay in England he may commit an act of bankruptcy in England, and thus give jurisdiction to the English Court of Bankruptcy, although, if he leave England without having com-

married woman cannot be made bankrupt in respect of a debt incurred since marriage - *ex parte Jones*. In re *Gravel* 48 C. L. J. N. S. 5 bankruptcy page 109 -

mitted an act of bankruptcy, the mere fact of indebtedness in England will not give the court jurisdiction (re *Crispin*, L. R. 8 Ch. 374). It makes no difference that the debt is contracted abroad; thus if a foreigner domiciled abroad contracts a debt abroad to another foreigner also domiciled abroad, such debt will support an adjudication against the debtor if he comes to England, and there commits an act of bankruptcy (ex parte *Pascal*, L. R. 1 Ch. D. 509; 24 W. R. 263).

The Statute of the Province of Ontario (35 Vict. chap. 16, section 8) enacts that a husband shall not, by reason of any marriage which shall take place after the Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued therefor, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continued unmarried. Under this section, a married woman who has no property belonging to her for her separate use is not liable to become insolvent (ex parte *Holland*, 30 L. T. N. S. 106; L. R. 9 Ch. App. 307).

It may be observed, that there is in the Act a recognition of the liability of a married woman to become bankrupt. Section 26 speaks of the examination of the "husband" of the insolvent, and this indicates that the insolvent may be a married woman.

In the United States, a married woman who is a sole trader, may apply for the benefit of the bankrupt law (re *Collins* 3 Biss. 415); and where a married woman is living apart from her husband, and by the statute law of the State or Province, in such case, she is liable to be sued in all actions as if sole and unmarried, she may be proceeded against under the bankrupt law (re *Julia Lyons*, 10 C. L. J. N. S. 179; 2 Saw. 524; re *Kinkeade*, 7 B. R. 439).

In the latter case it was declared that a Court of Bankruptcy is clothed with all the powers of a Court of Equity, and if a *feme covert*, with the consent of the husband, can enter into co-partnership with him or any other person, then she may be declared a bankrupt on the petition of creditors, or at least the firm as a business entity may be so adjudged for the purpose of distributing assets among the creditors.

If the husband is *civiliter mortuus* or has abjured the realm or is in exile or under sentence of transportation, the wife becomes liable to be sued at law as a *feme sole*, and as such liable to bankruptcy (ex parte *Franks*, 7 Bing. 764; *Sparrow v. Carruthers*, 2 W. Bl. 1197). The same results follow if the wife is living apart from her husband, under a decree for judicial separation or order of protection (see *Ramsden v. Brearly*, L. R. 10 Q. B. 147).

It would seem doubtful whether an infant under any circumstances can be made a bankrupt (re *West*, 22 L. J. Bank., 71; re *Lake* L. R. 8 Ch. 51); at all events it can only be in respect of judgment debts, or debts incurred for necessities. It has been held in the United States that infants are not, as to their general contracts, within the provisions of the bankrupt law (re *Derby*, 8 B. R. 106).

The Insolvent Law does not in general embrace trustees, such as executors, administrators, and guardians and others acting strictly in a fiduciary capacity (*Groves v. Winter*, 9 B. R. 357).

But an executor who carries on his testator's trade to a greater extent than is required to wind up his business is liable to be adjudged insolvent as a trader (ex parte *Garland*, 10 Ves. 110), and the 117th section of the Act expressly extends the provisions of the Act to the heirs, administrators, or other legal representatives of any deceased person who if living would be subject to its provisions. But under this section a writ of attachment cannot issue against an executor or administrator as such. But if the insolvent dies after the assignment or the issue of a writ of attachment against him, the proceedings may be carried on by or against his executors or administrators (re *Sharpe*, 20 C. P. U. C. 82).

But it would seem before this can be done, the representative of the deceased insolvent must be clothed with proper authority by a grant of letters of administration or probate of the will (*Lawrie v. McMahon*, 6 P. R. U. C. 9; 8 C. L. N. S. 171). A person who is so unsound in mind as to be wholly incapable of managing his own affairs, cannot in that condition, commit an act for which he can be forced into bankruptcy by his creditors, against the objection of his guardian (re *Marvin*, 1 Dillon, 178).

A party who is under guardianship as a lunatic may be pro-

ceeded against in involuntary bankruptcy, in opposition to the wish of his guardian (re *Weitzel*, 14 B. R. 466).

It seems a lunatic may be adjudged a bankrupt upon a debt contracted and an act of bankruptcy committed by him whilst sane, or during a lucid interval (*Anon.* 13 Ves. 590; ex parte *Stamp*, De Gex 345).

But a lunatic cannot commit an act of bankruptcy, involving an intent, unless during a lucid interval (*Crisp v. Perritt*, Wils. 473; ex parte *Priddey*, Cooke, 48; ex parte *Stamp*, De Gex, 45).

In the United States it has been held that if a person while sane has committed an act of bankruptcy, he may be made bankrupt after he has become lunatic. The rights of the bankrupt will be fully protected by his guardian (re *Pratt*, 6 B. R. 276).

A clergyman may be made bankrupt; and, if he carry on a trade, may, it would seem, commit those acts of bankruptcy which are peculiar to traders (ex parte *Meymot*, 1 Atk. 198-201; *Cobb v. Symons*, 5 B. & A. 516).

The commercial definition of a trader is one who makes it his business to buy and sell merchandise or other things ordinarily the subject of traffic and commerce; (re *Cowles*, 1 B. R. 280; *Love v. Love*, 21 Pitts. L. J. 101).

In order to be a trader the person must buy as well as sell (*Hall v. Cooley*, 3 N. Y. Leg. Obs. 282; re *Chandler*, 4 B. R. 213). If he merely makes up the product of his own land he is not a trader. (ib.; re *King*, 1 N. Y. Leg. Obs. 276).

A sale of surplus commodities not purchased with a view to sale, is not such a dealing as will render the party a trader (*Hall v. Cooley*, 3 N. Y. Leg. Obs. 282).

A person who carries on the business of a distiller, and also buys cattle which he fattens and sells is a trader (re *Eccles*, 1 N. Y. Leg. Obs. 84; 5 Law Rep. 273).

If a person is engaged in a business requiring the purchase of articles to be sold again, either in the same or in an improved state, he must be regarded as "using the trade of merchandise" (re *Hoyt*, 1 N. Y. Leg. Obs. 132; *Wakeman v. Hoyt*, 5 Law Rep. 309). But a person who sells the mere produce of his own labour is only a seller, and not a trader (ib). A person who owns and

leases oil land, and receives a part of the products as rent, is not a trader as respects his dealings in the products of his land in a crude state. The word "trader" is to be interpreted according to its meaning in the English Bankrupt Law. The intervention of a factor and the commercial disposal of the products by him and the accommodation which he may have extended as a banker, will not in such case make the principal a trader (re *Woods*, 7 B. R. 126).

The word "traders," as used in the Statute, must be understood and interpreted by its meaning at the present day, as the limits of trade have been so much extended beyond what they were in former times. Printing and publishing a newspaper is a trading (*Pinkerton* q. t. v. *Ross*, 33 Q. B. U. C. 508). So a banker and exchange and money broker, and a dealer in foreign and uncurrent money, and buying and selling stocks is a trader (*Duncan* v. *Smart*, 35 Q. B. U. C. 532; see also *Bagwell* v. *Hamilton*, 10 U. C. L. J. 305); and a person may be adjudged a bankrupt as a banker, if he acts as one, although he does not keep an open shop, or books as bankers usually do. (ex parte *Wilson*, 1 Atk. 217).

A barber is not a trader, and the sale of perfumery being merely incidental to his business, and a purchase of tobacco nine months before his assignment, which he sold again immediately, being an isolated transaction, were held upon the evidence insufficient to bring him within the Act (*Thomas* v. *Hall*, 6 P. R. U. C. 276).

The term "brokers" has been held to include not merely brokers employed in the purchase and sale of merchandise, but also pawn-brokers (*Rawlinson* v. *Pearson*, 5 B. & Ald. 124, bill-brokers; ex parte *Phipps*, 2 Dea. 487, assurance brokers; ex parte *Stevens*, 4 Mad. 256, stock-brokers; Cullen 12, note 2; and ship-brokers, *Pott* v. *Turner*, 6 Bing. 702).

A person, who merely discounts bills for the accommodation of his friends, is not a bill broker (ex parte *Phipps*, 2 Dea. 487). Neither will a person who occasionally sells shares for his friends be a share broker (re *Cleland*, L. R. 2 Ch. App. 466). But a solicitor, who was in the habit of laying out the money of his clients by way of investment, was adjudged bankrupt as a money broker (ex parte *Gem*, 2 M. D. & D. 99).

A builder is a person who builds for hire or by contract for

others, or who, as part of his business, buys or takes a lease of land for the purpose of building thereon, with a view to profit by selling or letting the houses; one or two isolated transactions will not make a man a builder, if there is no intention to carry on the business as a means of livelihood (*Stuart v. Sloper*, 3 Exch. 700; ex parte *Stewart*, 3 D. & S. 577).

Under the description of cattle and sheep salesmen is included a farmer who habitually deals in cattle or sheep to an extent not required for the purposes of his farm in the ordinary course of husbandry, for he is in fact a cattle jobber as well as a farmer (ex parte *Newall*, 3 Dea. 333).

So keepers of inns include lodging-housekeepers, or boarding-housekeepers, who supply provisions to their lodgers at a profit and as a means of getting a livelihood (ex parte *Bowers*, 2 Dea. 99; *Smith v. Scott*, 9 Bing. 99); and this whether the lodgers take their meals with the proprietor or separately.

Under the Act of 1869, which did not in any way define the meaning of the word "trader," it was held that an innkeeper was not a trader (*Harman v. Clarkson*, 22 C. P. U. C. 291).

A professional nurse, who keeps a lodging-house for invalids and supplies them with board at a profit, as well as lodging and nursing, is a keeper of an "hotel," and therefore a trader within the Act (ex parte *Thorne*, L. R. 3 Ch. D. 457).

Persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, or otherwise, in gross or by retail.

Under this description seem to be embraced the regular merchants and traders of the country. It applies to persons who practise merchandise as a trade, by which they seek to get a living (*Hankey v. Jones*, Cowp. 745; *Richardson v. Bradshaw*, 1 Atk. 128). It will not include a person who raises money on bills for his private use, and not with a view to gain a profit on the exchange (ib.); but it will include a commission agent for the sale and purchase of merchandise (ex parte *Hawker*, 26 L. T. N. S. 54.)

Persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling, or buying and

letting for hire, goods or commodities, or by the workmanship or conversion of goods or commodities or trees.

It has always been held that trading by buying and selling goods and commodities has reference only to dealings in such goods, wares, or chattels, as are the ordinary subject of merchandise (ex parte *Hawker*, 26 L. T. N. S. 54). Thus it was held not to apply to the buying and selling of shares (re *Cleland*, L. R. 2 Ch. App. 466). So, also, it does not extend to land or any interest in land, or to articles manufactured from the soil, or produce of land, by the owner or occupier, although other ingredients or materials are purchased by him and used for the purpose of ameliorating the produce of the land, and rendering it a more marketable commodity (*Port v. Turton*, 2 Wils. 169). Thus it has been held not to apply to a person who sold alum, made from alum rocks in his possession, as owner or lessee (*Newton v. Newton Crookes*, 8 B. 8th Ed., 71); or to a burner of lime (ex parte *Ridge*, 1 Rose, 316); or the owner of a slate quarry (re *Cleland*, L. R. 2 Ch. App. 466); or a manufacturer of bricks (*Wells v. Parker*, 1 T. R. 34); or the manufacture of salt from salt springs (ex parte *Atkinson*, 1 M. D. & D. 300), where the material used was the produce of land in the possession of the person carrying on the business either as owner or lessee. The same principle has been applied to the owner or lessee of a coal mine, or stone quarry (ex parte *Gardner*, 1 Rose, 377); or phosphate mine (ex parte *Schomberg*, L. R. 10 Ch. App. 172); and to a farmer who sells cheeses or cider, respectively made from milk and apples produced on his farm (*Newton v. Newton*, *ubi supra*), and to other cases of a like nature. If, however, a man bought the whole or a very large portion of the materials necessary to make the manufactured article in which he dealt, as if for making bricks he bought the clay as well as the other subsidiary ingredients, he was held to be a trader (ex parte *Salkeld*, 3 M. D. & D. 125). So where a smelter of iron mixed sixty-five per cent. of iron ore purchased by him with that produced from his own land, he was held to be a trader (*Turner v. Hardcastle*, 11 C. B. N. S. 689). So, also, a man who buys timber whether standing or not, for the purpose of selling again, is a trader



(*Holroyd v. Gwynne*, 2 Taunt. 178). But the lessee of a quarry who dug rocks and worked up the materials into slates was held not to be a trader in respect thereof, because he sold tools and gunpowder to his workmen, or allowed a builder to have some iron and timber for the erection of a forge and buildings for the purposes of the quarry, and for which the builder was charged in his accounts (re *Cleland*, L. R., 2 Ch. App. 466). The doctrine under consideration is no longer applicable to brick-makers, limeburners, miners, or quarrymen, as they are expressly made subject to the provisions of the Act.

In order to constitute a trading by buying and selling, or by buying and letting for hire, or the workmanship of goods, or commodities, these occupations must be followed as a means of gaining a livelihood; one or two isolated transactions will not do. But if the intention of getting a living is proved, either by the party's own admission or otherwise, the extent or duration of the trading is immaterial (*Millikin v. Brandon*, 1 C. & P. 380; *Hunkey v. Jones*, Cowper, 745; ex parte *Maule*, 14 Ves. 603).

A person employed to buy and sell for another at a salary and without deriving any profit therefrom, is merely a servant, and not an agent who gets his living by buying and selling for others. But a servant, who buys goods of his master, as, for instance, copies of a newspaper to sell again, he bearing the loss, if any, is a trader (*Gillingham v. Laing*, 6 Taunt. 532). Again, the doing one only of the acts specified will not be sufficient to make a trading; thus a buying without selling or letting for hire, at least without an intention to sell, or to let for hire, or *vice versa*, will not constitute a trading (ex parte *Gibbs*, 2 Rose, 38). So also the buying and selling must be in the general way of business, and not in a qualified manner, or only for a special purpose (ex parte *Gullimore*, 2 Rose, 428); as where a trader having ceased to trade, sells off his surplus stock (*Cotton v. Daintry*, 1 Vent. 29); or a man having purchased more goods than he wants for his private use, sells off the surplus (*Summersett v. Jarvis*, 3 B. & B. 2); or where a schoolmaster supplies his pupils with books and provisions, (*Valentine v. Vaughan*, 1 Peake, 76); or an executor only disposes of his testator's stock in trade, for the purpose of winding

up his estate, or merely continues the business to the extent that is necessary to complete contracts entered into by the testator (*Edwards v. Grace*, 2 M. & W. 190). In like manner, and upon similar principles, it has been held, that, if a lodging-house keeper buys furniture to let with his lodgings, this is not a buying and letting for hire within the Act; the buying and letting the furniture being merely ancillary or incidental to the principal object, that of letting lodgings, (ex parte *Bowers*, 3 M. & A. 33).

The words "or by the workmanship or the conversion of goods or commodities," would seem to comprise not merely persons who buy the raw material and work it up into some article of manufacture for the purpose of sale, but also persons who manufacture articles from materials of their own production. The words, however, do not apply to the workmanship or conversion of the produce of land by the owner or lessee (re *Cleland*, L. R. 2 Ch. App. 466).

The exemption of a farmer, grazier, common labourer or workman for hire merely extends to the occupations specifically mentioned, and will not protect a person from insolvency as a trader who follows some other business within the statutory definition of trading. Thus a farmer who deals in cattle or other animals to a greater extent than can be fairly considered incidental to his farming will be deemed a trader (*Bell v. Young*, 15 C. B. 524). So if he buys and sells farming produce not grown on his farm, with a view to profit, he will be a trader within the Act (*Mayo v. Archer*, 1 Str. 514). If in fact he buys and sells animals and commodities not merely as ancillary to his farming business but as the means of making a living thereby independently of his farm, he will be a trader. An occasional dealing with particular friends will not be sufficient (*Bartholomew v. Sherwood*, 1 T. R. 573); but where the trading is a man's common or ordinary mode of dealing, whatever be the quantum, that is sufficient (*Patman v. Vaughan*, 1 T. R. 572; *Cannon v. Denew*, 10 Bing. 292; ex parte *Magennis* 1 Rose 84); and one act of trading with an intent to continue, will be sufficient (*Holroyd v. Gwynne*, 2 Taunt. 178; *Heanny v. Birch*, 3 Camp. 233). A person who retires from trade is not liable in respect to debts subsequently contracted (ex parte *Pat-*

*tersen*, 1 Rose 402; *ex parte Mitchell*, 1 De Gex, 257; *ex parte Caudy*, 2 Rose 357); but if he continues to sell off his goods he remains a trader (*Rawlinson v. Pearson*, 5 B. & A. 124; *Paul v. Dowling*, Moo. & M. 263).

The distinction taken in England whether every one who buys and sells goods is *quoad hoc* a tradesman may admit of question; and yet it is very difficult to draw any line founded solely on the smallness of the transactions. It would seem that any one who buys on credit with intent to sell again at a profit, and who has no other regular business, is fairly within the mischief of the Act. Though where the buying and selling are a mere incident, as if a farmer should buy stock or grain, in addition to what he had raised, perhaps such a person could not be described as a trader (re *Tyler*, 4 B. R. 104). A person who bought goods which he could use and did use, and which he sold when pressed for money, cannot be deemed a trader. Isolated and separate acts having no connection with each other, and showing no intention to set up any trade, do not make a person a trader. The deliberate purpose of buying goods to sell them again might be within the letter of the Act; so might an amount of trading, however small, connected with an intent to deal generally (re *Rogers*, 3 B. R. 564).

Debts barred by the Statutes of Limitations do not, by the express terms of this section, afford ground for placing the estate of the debtor in liquidation. Such is also the law in England (*Quantock v. England* 2 Bl. 703), where it is also held that a debt founded on an illegal consideration is insufficient (*Wells v. Girling*, 1 B. & B. 447).

Where the intention of the Legislature is to make a law retrospective, there is no doubt that they have the power to do so. This intention is a question of construction, to be gathered clearly and unmistakably from the purview and scope of the Act. It would seem that this clause is retrospective, and it extends the provisions of the Act to those who at some time prior to its passing were traders, and had incurred debts as such, but who were not in business as traders at the time the Act was passed

(re *Archibald*, Supreme Court, Nova Scotia, 1871, reported 7 C. L. J. N. S. 300).

Re *Archibald* was decided on the 34 Vict. chap. 25, sec. 1; but there is no material difference between this Statute and the present Act. The 34 Vict. chap. 25, s. 1, was held to apply to a case where proceedings, commenced under the Insolvent Act of 1869, were still pending at the time the 34 Vict. chap. 25 was passed. Therefore where insolvents who had ceased to be traders before the first day of September, 1869, applied for and obtained an order of discharge under sec. 106 of the Act of that year, the discharge was confirmed on appeal to the Supreme Court; the operation of the original Statute having in the meantime been so extended by the amending enactments as to bring the case within its scope (re *Archibald*, supra); and in the Province of Quebec, on the 34 Vict. chap. 25, a similar decision has been rendered. It was there held that, although there was no proof of a party having traded for over three years, yet such party will be still considered a trader if his debts are unpaid, and will be liable to the provisions of the Insolvent Act (*Buchanan and McCormick*, 19 L. C. J. 29). If the debts are not barred by the Statute of Limitations, or prescribed (see re *Archibald*, supra), they need not be incurred since the passing of the Act.

Statutes relating to the conduct of Assignees and the jurisdiction of the Court over them would apply to Assignees appointed before the Act were passed, at all events as to matters occurring after the statute (re *Botsford*, 22 C. P. U. C. 65.)

The Act of 1864 has been held not to be retrospective, (*Bagwell v. Hamilton*, 10 U. C. L. J. 305).

In England, prior to the Bankruptcy Act of 1869, it was held that a man might be made a bankrupt as a trader, after he had ceased to trade in respect of a debt contracted or subsisting during the trading (*Bailie v. Grant*, 9 Bing. 121); and the act of bankruptcy might be committed after the trading had ceased (ex parte *Bamford*, 15 Ves. 453). But it has been held there that the Act of 1869 has not a retrospective effect and that a man cannot be made a bankrupt as a trader, unless he was a trader at the

commencement of the Act or became one subsequently (ex parte *Bailey*, L. R. 13 Eq. 314; 25 L. T. N. S. 918).

2. The word "county" shall mean a county or union of counties, and the word "district" shall mean a district, as defined for judicial purposes by the Legislature of the Province wherein the same is situate.

The word "county" in the said Act includes any judicial district in the province of Ontario not organized into a county (39 Vict. chap. 30, s. 21).

For all the purposes of The Insolvent Act of 1875, the temporary Judicial District of Nipissing in the Province of Ontario shall be taken and considered as part of the County of Renfrew, and so much of the territory comprising the Territorial District of Parry Sound and the Territorial District of Muskoka, as is not already included in the Judicial County of Simcoe shall be taken and considered as part of the said Judicial County of Simcoe; and all persons and courts having authority or jurisdiction in the said Counties of Renfrew and Simcoe respectively under the said Act shall have like authority and jurisdiction in the said District of Nipissing and the said Districts of Parry Sound and Muskoka respectively (40 Vict. s. 24.)

Under "The Interpretation Act" (31 Vict. chap. 1, s. 7.) "Ninthly: The word 'county' includes two or more counties united for purposes to which the Act relates."

a. "Official Assignee" shall mean the person or persons appointed by the Governor in Council as hereinafter provided, to act as Assignee or Joint Assignee under this Act in any County or District.—"Assignee" shall mean either the Official Assignee or the Assignee appointed by the Creditors, as the context may require.

b. "Official Gazette" shall mean the Gazette published under the authority of the Government of the Province where the proceedings in Bankruptcy or Insolvency are carried on, or used as the official means of communication between the Lieutenant-Governor and the people, and if no such Gazette is published, or if such Gazette is not, in the opinion of the Court or Judge published with sufficient frequency to enable the required notice to be conveniently published therein, then it shall mean any newspaper published in the County, District or Province, which shall be designated by the Court or Judge for publishing the notices required by this Act (39 Vict. chap. 30, s. 1).

See as to Official Gazette, re *Huffman*, 5 U. C. L. J. N. S. 71.

c. The word "Court" shall mean the Superior Court in the Province of Quebec, the Court of Queen's Bench in the Province of Manitoba, and the County Courts in the Provinces of Ontario, New Brunswick, British Columbia,

and Prince Edward Island, and also in Nova Scotia whenever County Courts shall have been established in that Province, and until such County Courts are established it shall mean the Court of Probate of that Province.

And under the " Interpretation Act " (31 Vict. chap. 1, s. 7), " Eighteenthly : The words " Superior Courts " in the Province of Quebec, denotes the Court of Queen's Bench and the Superior Court in and for the said Province."

Courts of Bankruptcy as they exist in England are separate distinct organizations with powers and jurisdiction separate and distinct from all other courts. In this country, however, instead of creating new organizations, some of those already existing were taken up and made use of in lieu of new organizations. Thus, in the Province of Quebec, the Superior Court is the Court having jurisdiction in insolvency, the Queen's Bench in the Province of Manitoba, and the County Courts in the other Provinces. But although the insolvency jurisdiction is thus as it were added to these Courts, yet while acting in insolvency matters, they are none the less separate and distinct courts exercising powers and jurisdiction as separate and distinct from their other powers and jurisdictions than if they were separate and distinct organizations (re *Norris*, 4 B. R. 35). But these Courts as Courts having jurisdiction in insolvency are the creatures of the statute and have no powers except those conferred upon them either expressly or by necessary implication for the just and full execution of the law (re *Morris*, Crabbe, 70 ; *Clark v. Binninger*, 3 B. R. 518).

d. The word " Judge " shall mean a judge of the said courts respectively, having jurisdiction in the county or district where proceedings shall be had under this Act, and shall also include a junior and deputy judge when such are appointed.

Under the Act of 1869, in the Province of Quebec, the judge having jurisdiction in insolvency, was the judge of the domicile of the insolvent, and a judge in the Province of Quebec had no right to interfere with insolvency matters originated in Ontario, where the insolvent had his domicile, even though the assignee resided in the Province of Quebec, and the affairs of the estate

were being carried on there (re *McDonnell*, 15 L. C. J. 145; see re *Berthelot*, 3 *Revue Legale*, 122).

Under this clause, however, it is conceived "judge" will mean a judge having jurisdiction where the proceedings are being carried on, as well in the Province of Quebec as in the other Provinces (see ex parte *Thomas*, 2 Hannay, 163).

e. The word "debtor" shall mean any person or persons, co-partnership, company, or corporation, having liabilities, and being subject to the provisions of this Act.

The English Act uses the words "any debtor," and it is there held that the word "debtor" must be construed to mean "a debtor properly subject to the laws of England;" and this, it seems, should be taken to include not only English subjects and denizens, but also foreigners domiciled in England, and foreigners trading in England, and this whether or not they have committed an act of bankruptcy while personally resident in England; and lastly foreigners, who being neither domiciled nor trading in England have contracted debts and committed an act of bankruptcy during their personal residence there. But it does not include foreigners not domiciled nor carrying on trade in England, who quit England without having committed an act of bankruptcy (re *Crispin*, L. R. 8 Ch. 374; 28 L. T. N. S. 483; see also *Alexander v. Vaughan*, Cowp. 398; *Dodsworth v. Anderson*, Raym. 375; *Allen v. Cannon*, 4 B. & A. 418).

f. The word "insolvent" shall mean a debtor subject to the provisions of this Act unable to meet his engagements, or who shall have made an assignment of his estate for the benefit of his creditors.

g. The words "before notaries" or "before a notary," shall mean executed in notarial form, according to the laws of the Province of Quebec.

h. The word "creditor" shall mean every person, co-partnership or company to whom the insolvent is liable, whether primarily or secondarily, and whether as principal or surety;—but, in reference to proceedings at meetings in insolvency, to the right of voting, to the execution of a deed of composition and discharge, the consent to a discharge of an insolvent, or any other consent or action with regard to the management and disposal of the estate of an insolvent, the word "creditor" shall mean a person, co-partnership or company whose unsecured claims, to an amount of one hundred dollars or

upwards, have been proved in the manner provided by this Act, and the proportion of claims in value required to give validity to any such proceeding or action shall be formed of all claims so proved, whether above or under one hundred dollars, and of no others; and with regard to any deed of composition and discharge, or the consent to a discharge of the insolvent, no creditor whose claim is not affected by such discharge shall be reckoned as one of the required number of creditors, nor shall his claim be reckoned as forming part of the proportion of claims required to give effect to such composition and discharge. For all the purposes of this Act the required amount of the creditor's claim shall be over and above any set-off or counter-claim of the debtor against such creditor; and every affidavit of indebtedness made by any creditor shall be construed as made in this sense.

When the Act speaks of the word "creditor" meaning every person to whom the insolvent is liable, whether primarily or secondarily, and whether as principal or surety, the primary and secondary liability referred to is that of the insolvent and not of the creditor (*Roe v Smith*, 15 Grant, 346). Thus the holder of a note on which the insolvent is endorser, would be a creditor within this clause in the same manner as if the insolvent were maker.

A secured creditor is one who holds security from the insolvent or from his estate. Such a creditor is not bound to come in and rank with the general creditors. If his security is sufficient, he may look to that alone; but if he elects to come in he must put a value on his security and comply with the provisions of the 84th section of the Act (see re *Hurst*, 31 Q. B. U. C. 116). In such case he may rank on the estate for the balance, and a secured creditor would probably be considered a creditor for the difference between the value of his security and the total amount of the insolvent's indebtedness to him.

This clause requires the creditor to prove his claim, in order to give validity to any consent or action on his part (see also section 143 of the Act of 1869).

This clause provides, in reference to deeds of composition and discharge, &c., that a creditor whose claim is not affected by the discharge, shall not be reckoned as one of the required number of creditors to give such deed validity, nor shall his claim be reckoned as forming part of the proportion of claims required to



give effect to such deed of composition and discharge. The claims not affected by the discharge, are enumerated in the sixty-third section of the Act. To these may be added privileged debts, and secured claims when the secured creditor elects to retain his security, and not to rank on the estate (see section 82).

A creditor cannot vote at any meeting unless his claim amounts to one hundred dollars, and unless, also, that claim is proved ; and a secured creditor would seem entitled to vote only where he had valued his security, and proved against the estate for the deficiency, and that deficiency exceeded one hundred dollars.

In England, a secured creditor is for the purpose of voting, deemed to be a creditor only in respect of the balance due to him after deducting the value of his security. If he votes in respect of the whole debt without deducting the value of his security, he loses the benefit of his security by so doing ; but his vote is not invalidated thereby (re *Hoare*, L. R. 18 Eq. 705).

There seems no objection to admitting a secured creditor to the rights and privileges of unsecured creditors, in respect of the balance of his claim after deduction of the value of his security ; although this clause, and also section four of the Act, speaks of "unsecured claims," yet it would seem this must be taken to mean unsecured, in respect of the amount for which the creditor claims to rank on the estate (see section 106 of this Act; see also notes to sections 4 and 9).

i. The word "collocated" shall mean ranked or placed in the dividend sheet for some dividend or sum of money.

j. In the case of any partnership or any company, incorporate or not, the word "he," "him," or "his" used in relation to any insolvent or creditor, shall mean "the partnership" or "the company" or of "the partnership" or "of the company," (as the case may be) unless the context requires another interpretation to give such effect as the purposes of this Act require, to the provision in which the word occurs.

3. A debtor shall be deemed insolvent—

a. If he has called a meeting of his creditors for the purpose of compounding with them, or if he has exhibited a statement shewing his inability to meet his liabilities or if he has otherwise acknowledged his insolvency.

Insolvency means an inability to pay debts as they mature and

become due, and payable in the ordinary course of business as persons carrying on trade usually do, in that which is made by the laws of the country lawful money, and a legal tender to be used in the payment of debts, without reference to the amount of the debtor's property, and without reference to the possibility, or probability, or even certainty that, at a future time, in the settlement and winding up of all his affairs, his debts will be paid in full out of his property. Nothing else is a legal tender in payment of debts, but that which is declared by the law of the country a lawful money and a legal tender. Property is not a lawful tender in payment of debts, and a debtor has no right to pay a debt with property of any kind; therefore, the amount of the trader's property is of no consequence if such inability to pay matured debts in such lawful money exists (*Hardy v. Clark*, 3 B. R. 385; re *Williams*, 3 B. R. 286). But insolvency is not to be inferred in every instance of temporary want of funds to pay notes coming to maturity. This would be tantamount to holding that, whenever a trader suffers a note to go to protest for want of funds in hand wherewith to pay, he can thereupon be adjudged insolvent (*Hardy v. Binninger*, 4 B. R. 262).

In *Mason v. Redpath*, 39 Q. B. U. C. 169, the Court expressed an opinion that allowing commercial paper to go to protest was not an act of bankruptcy under this section.

There is no doubt that merely allowing a note to go to protest will not render a debtor liable to be placed in insolvency. But paper might be protested so frequently as to afford evidence that the debtor had ceased to meet his liabilities generally as they became due, in which case he would be subject to a demand under the fourth section.

But inability to pay one debt in the ordinary course of business is sufficient to constitute insolvency (re *Diblee*, 2 B. R. 617; *Driggs v. Moore*, 3 B. R. 602). A solvent man is one who is able to pay all his debts in full at once, or as they become due. Insolvency is merely the opposite of solvency. A man who is unable to pay his debts out of his own means, or whose debts cannot be collected out of such means by legal process is insolvent, and this, although it may be morally certain that with indulgence from his

creditors, in point of time, he may be ultimately able to satisfy his engagements in full. The term insolvency imports a present inability to pay. The probable or improbable future condition of the party in this respect does not affect the question. If a man's debts cannot be made in full out of his property by levy and sale in execution, he is insolvent within the primary and ordinary meaning of the word and particularly in the sense in which the word is used in the Bankrupt Act (re *Wells*, 3 B. R. 371; re *Oregon Printing Company*, 13 B. R. 503).

A debtor is legally insolvent when he has not sufficient property subject to execution to pay all his debts if sold under legal process, and commercially insolvent when he has not the means to pay off and discharge his commercial obligations as they become due in the ordinary course of business (*Harris v. McLaren*, 10 B. R. 244; *Smith v. McLenn*, 10 B. R. 260). The commission of an act of bankruptcy is considered as a test of insolvency, showing conclusively the inability of the debtor to pay his debts or carry on his trade (*Shawhan v. Wherritt*, 7 How. 627).

Insolvency as used in the Bankrupt Act, in force in the United States, does not mean an absolute inability to pay one's debts at a future time upon a settlement and winding up of all the trader's concerns, but a trader may be said to be in insolvent circumstances when he is not in a condition to pay his debts in the ordinary course of business as persons carrying on trade usually do (*Sawyer v. Turpin*, 5 B. R. 339; s. c., 13 B. R. 271; re *Forsyth*, 7 B. R. 174).

The Act is not intended to cover all cases of insolvency to the exclusion of other judicial proceedings. It is very liberal in the class of insolvents which it does include, and needs no extension in this direction by implication. But it still leaves, in a great majority of cases, parties who are really insolvent, to the chances that their energy, care, and prudence in business may enable them finally to recover without disastrous failure or positive bankruptcy—all experience shows both the wisdom and justice of this policy. Many find themselves with ample means, good credit, and large business, totally insolvent; that is, unable to meet their current obligations as fast as they mature. But by forbearance

of creditors, by meeting only such debts as are pressed, and even by the submission of some of their property to be seized on execution, they are finally able to pay all and save their commercial character, and much of their property. If the creditors are not satisfied with this, and the parties have committed an act of bankruptcy, any creditor can institute proceedings. But until this is done, their honest struggle to meet their debts, and to avoid the breaking up of all their business, is not of itself to be construed into an act of bankruptcy or a fraud on the Act (*Wilson v. City Bank*, 5 B. R. 270 ; 1 Dillon, 476).

It would seem that a debtor cannot be placed in insolvency unless some one of the circumstances arises which the Act declares shall render him so liable. Some circumstance must arise which the Act declares shall subject the debtor's estate to liquidation. The act must be committed in Canada, and within the jurisdiction of some Insolvent Court. The act, when once committed, cannot be purged except by lapse of time. The debt of the insolvent must not be contracted after he has ceased to trade. Proceedings must be taken, under the Act, within three months next after the act or omission, relied upon as subjecting the estate thereto (see sections 1 and 8 ; also Robson, 3rd Ed. 109).

That part of the Statute which enumerates the acts of bankruptcy, is in the nature of a penal Statute, and to be construed strictly. It cannot be enlarged by construction to include acts that are within the reason of the law, or the mischiefs intended to be provided against, but which are not within the words of the Statute, according to their reasonable construction (*Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131).

Under the English Act, the acknowledgment of insolvency by the debtor must be in the form of a declaration, filed in the Court for the district in which the debtor resides, and witnessed by an attorney or solicitor entitled to practise in the Court. The declaration must admit, under the signature of the debtor, his inability to pay his debts. It is apprehended that, under our Statute, a formal acknowledgment of this character would not be required. A letter by the debtor, admitting insolvency, or making

an offer of compromise, or even a verbal admission of inability to pay in full, would, it is apprehended, be sufficient under this clause. The writer has obtained a writ of attachment, under section nine of the Act from the Insolvent Court, where the only evidence of insolvency was the debtor's letter, offering a compromise and stating his inability to pay in full. This letter was attached to the affidavit made by the creditor under that section, and this admission of insolvency was made the ground of the proceeding.

A debtor admitting insolvency by his acts is conclusively presumed to contemplate insolvency (re *Waite*, 1 B. R. 373).

b. If he absconds or is immediately about to abscond from any Province in Canada with intent to defraud any creditor, or to defeat or delay the remedy of any creditor, or to avoid being arrested or served with legal process ; or if, being out of any such Province in Canada, he so remains with a like intent ; or if he conceals himself within the limits of Canada with a like intent.

Under this clause the intent is a material ingredient, and must be shown either by necessary inference or from the circumstances (ex-parte *Bamford*, 15 Ves. 449 ; *Aldridge v. Ireland*, 1 Taunt. 273).

Every man must be held to intend the necessary consequences of his own acts, and where a debtor knows that the necessary consequence of his going abroad will be to defeat or delay certain creditors, he will be held to have gone abroad with intent to defeat or delay his creditors, and will be adjudicated an insolvent accordingly (ex parte *Goater*, 30 L. T. N. S. 620).

This case was decided on the English Statute, which makes it an act of bankruptcy for a debtor to depart out of England with intent to defeat or delay his creditors. But the same rule would not apply to a foreigner domiciled abroad, unless he knew that a writ was issued against him and he went abroad to avoid service, (ex parte *Crispin*, L. R. 8 Ch. App. 372).

If the debtor goes abroad for a proper purpose and his creditors are not thereby delayed it will not be an act of bankruptcy (ex parte *Mutrie*, 5 Ves. 576).

The mere intention on the part of a debtor to sell and dispose

of all his property, and the apprehension of his sole creditor that he will not then, though perfectly able and owing no one else, pay the creditor his debt, does not bring the debtor within the operation of this clause if there is no actual intent to defraud shown (*Sharp v. Matthews*, 5 U. C. P. R. 10).

c. Or if he secretes or is immediately about to secrete any part of his estate and effects with intent to defraud his creditors, or to defeat or delay their demands or any of them.

The sale of moveables by an insolvent debtor to a person for value received does not amount to a secretion of his estate (*Robertson v. Overing*, 20 L. C. J. 299).

d. Or if he assigns, removes or disposes of, or is about or attempts to assign, remove or dispose of any of his property with intent to defraud, defeat or delay his creditors or any of them.

Where a debtor has ample means to satisfy all claims against him, a sale of part of his property for a full consideration to a *bona fide* purchaser cannot render his estate liable to compulsory liquidation under this clause, merely because he declines to pay the proceeds to one of his creditors, though coupled with subsequent circumstances, tending to raise a suspicion of the good faith of the party in the disposal of the money (*Royal C. Bank v. Matheson*, 6 U. C. L. J., N. S. 9.)

In this case the assets amounted to \$3,818, and the liabilities to \$2,831. A house of the alleged insolvent was sold for \$1,850, and the suspicious circumstance was that \$1,000 was paid to the wife to induce her to bar dower, on the pretence that she positively refused to do so without this sum paid out of the purchase money.

The intent means an actual design in the mind, and must be proved as a question of fact (re *Drummond*, 1 B. R. 231; re *Goldschmidt*, 3 B. R. 165).

The intent need only exist on the part of the person making the transfer. If that exist, the debtor clearly commits an act of bankruptcy, however innocent the intent of the preferred creditor, or the person to whom the transfer is made (re *Drummond*,

1 B. R. 231). The question of intent to defraud, defeat, or delay creditors must be solved by looking at what the debtor says and does, and the effect thereof (*Ecfort v. Greely*, 6 B. R. 433 ; re *Ryan*, 2 Saw. 411).

A mortgage given for a present consideration which is used to relieve the mortgagor's stock from an attachment, and to pay the only overdue paper of the debtor known to the mortgagee, is not a transfer with intent to delay creditors (re *Sandford*, 7 B. R. 351). A debtor has the right to mortgage his property or a portion of it, for the purpose of raising money to pay his debts ; but a mortgage given for the purpose, and with the manifest design of so encumbering his available means that creditors will be hindered and delayed in the collection of their demands, is fraudulent (re *Cowles*, 1 B. R. 280 ; *Baldwin v. Rosseau*, 1 N. Y. Leg. Obs. 391). A sale of all the debtor's property for a small portion in cash, and the balance in long notes does to that extent delay creditors (re *Dean*, 2 B. R. 89). The insertion of a power in the mortgage to enter and sell whenever the mortgagee may deem himself unsafe, is a suspicious circumstance (re *Ryan*, 2 Saw. 411).

A conveyance by a person whose property exceeds in value all that he owes, in consideration of an agreement, that the grantee shall pay all the grantor's debts, and support him during the residue of his days, is not *per se* fraudulent and void, as against creditors (re *Cornwall* 6, B. R. 305).

If an insolvent firm is dissolved, and the assets transferred to one of the partners, who immediately executes a mortgage to secure a separate debt, the mortgage may be charged as a conveyance to hinder and delay creditors (re *Waite*, Lowell, 407). A transfer of the firm property by one partner to his co-partner, is not a conveyance to hinder or delay the firm's creditors (re *Munn*, 7 B. R. 468). Allowing property to be taken on a false and fictitious judgment, is a transfer with intent to defraud, defeat, and delay creditors (re *Schick*, 1 B. R. 177).

To make a general assignment for the benefit of creditors an act of bankruptcy within the meaning of this clause, it must be made with intent to defraud, defeat, or delay creditors within the

meaning of the Statute 13th Elizabeth, as exemplified in *Twynne's* case, and other subsequent decisions following it. It becomes a question of fact. The innocence or guilt of the act depends on the mind of him who did it, and it is not a fraud within the meaning of the Bankrupt Act, unless it was meant to be so (*Perry v. Langley*, 1 B. R. 559; *Farrin v. Crawford*, 2 B. R. 602; *Potts v. Garwood*, Crabbe, 469). An assignment by a solvent person, for the benefit of creditors, with or without preferences, is void under the Statute of Frauds, because the natural consequence of it is to delay and defraud creditors, by preventing them from subjecting the debtor's property by the ordinary legal proceedings and process to the satisfaction of their claims. An assignment which authorizes the assignee to sell on credit, or in any manner to prolong his possession of the property beyond the time reasonably necessary to convert it into cash, and distribute it among the creditors, is fraudulent (re *Randall*, 3 B. R. 18).

It would seem that all deeds which are fraudulent and void under the Statute 13 Eliz. chap. 5, as having been made with intent to delay, hinder or defraud creditors, come within this clause. To bring a deed within this Statute, the fraudulent intent need not be actually proved or exist; it is sufficient if the circumstances are such as to warrant the inference of fraud. If it is shown that a deed was fraudulently executed for the express purpose of defeating creditors, it will be void (*Smith v. Hurst*, 10 Hare, 30), even though supported by some valuable consideration, as marriage (*Bulmer v. Hunter*, L. R. 8 Eq. 46; *Barnard v. Ford*, L. R. 4 Ch. App. 247), at least so far as respects the creditors sought to be defeated, but without prejudice to the parties from whom the valuable consideration proceeds, if not participators in the fraudulent design (*Champion v. Cotton*, 17 Ves. 263).

e. Or if with such intent he has procured his money, goods, chattels, lands or property to be seized, levied on or taken under or by any process or execution, having operation where the debtor resides or has property, founded upon a demand in its nature provable under this Act, and for a sum exceeding two hundred dollars, and if such process is in force and not discharged by payment or in any manner provided for by law.



The mere fact of a person in insolvent circumstances not defending one action, and defending and delaying another, is not illegal by the common law, but under this clause of the Insolvent Act it is a fraud for an insolvent to cause his goods to be taken in execution to the prejudice of his general creditors, even though the preferred claim be a just one, and if this is done by the judgment creditor with intent to defraud, the judgment would certainly be void (re *Jones* 4 U. C. P. R. 317).

But this clause requires some active participation on the part of the debtor, and merely refraining from entering an appearance whereby a creditor on a specially endorsed writ enters judgment by default, and thereby obtains a preference or priority over other creditors, is not in itself a procuring of the debtor's goods, &c., to be seized, levied on, or taken in execution within the meaning of the Act. But if a debtor asks his creditor to sue him and undertakes not to defend the action, but to defend other actions, so that he may obtain the first judgment, or if without the knowledge of the creditor, finding himself pressed by others, the debtor induces his own attorney to sue for the debt due to this particular creditor, and enters no appearance, though he appears and defends other actions brought against him; in these and similar cases there could be no doubt but that the debtor procures his goods to be taken in execution (*Worthington v. Hamilton*, 10 U. C. L. J. 304, *Logie Co. J.*).

Similar principles obtain in the United States. There it is held that merely allowing a creditor to obtain a judgment by default in an action for a debt, to which there is no defence, does not, as a conclusion of law, raise an implication of a motive or intent to prefer (*Wilson v. City Bank*, 9 B. R. 97; *Britton v. Payen*, 9 B. R. 445). Something more than the passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment, and levy on his property are obtained, when the debt is due and he is without just defence to the action, is necessary to show a preference of a creditor or a purpose to defeat or delay the operation of the insolvent law (*Wilson v. City Bank*, supra). But very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or of acts

done with a view to secure such preference, may be sufficient to invalidate the whole transaction (re *Baker*, 14 B. R. 433). The slightest solicitation on the part of the creditor will protect the judgment. Unless it clearly appears that the act originated with the debtor, and that he took the first step to have the judgment rendered, it is valid (*Haldeman v. Michael*, 6 W. & S. 128; *Wilkinson's Appeal*, 4 Penn. 284.)

There is a clearly recognised distinction between procuring and suffering. Suffer implies a passive condition, so to speak, as to allow, to permit; not a demonstrative act like the word procure (*Traders' N. B. v. Campbell*, 3 B. R. 498; s. c. 6 B. R. 353; re *Black*, 1 B. R. 353; re *Gallinger*, 4 B. R. 729).

Mere honest inaction when a creditor seeks to make a just debt by law is not in itself an act of bankruptcy (*Wright v. Filley*, 4 B. R. 611). It is not enough that the debtor is passive, and does nothing to prevent a creditor from taking his goods in execution. The words of the Act can be satisfied with nothing short of a positive agency and active co-operation. To be passive merely, and to do nothing, is not to procure an act to be done. It is not to aid, co-operate, or advise (*Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131). An agreement by the debtor that a default may be taken against him, at the time when it could have been entered according to the usual course of the Court without that agreement, is not a procurement of the taking of his property on legal process (ib.).

It is not an act of bankruptcy for a debtor to suffer his property to be taken on legal process with intent to give a preference, or to defeat or delay the operation of the Act (re *Scull*, 10 B. R. 165). The mere admission of the service of the summons does not amount to a procuring of his property to be taken on legal process where it is only done at the instance of the creditor's attorney, and without any collusion or complicity between the parties (re *King*, 10 B. R. 103). Every ordinary person knows that a judgment is regularly followed by an execution, in other words, that the tendency of procuring a judgment is that the execution shall follow. It is not, however, an absolute legal inference that a man who procures a judgment to be obtained against himself intends that

an execution shall follow, but a question of fact (re *Woods*, 7 B. R. 126). The question is whether the debtor wilfully facilitated, either directly or indirectly, the taking of his property on execution (ib).

It would seem that the terms "any process or execution," are not confined to any particular form of writ, execution or attachment (*Hardy v. Binninger*, 4 B. R. 262).

f. Or if he has been actually imprisoned or upon the gaol limits for more than thirty days, in a civil action founded on contract for the sum of two hundred dollars or upwards, and still is so imprisoned or on the limits; or if, in case of such imprisonment, he has escaped out of prison, or from custody, or from the limits.

The Act in force in the United States speaks of more "than twenty" days instead of "thirty." Under this Act it was held that an imprisonment commencing on the forenoon of September 8th, 1870, and terminating before noon on the 28th of that month was not sufficient. In legal contemplation the debtor was in prison nineteen entire days and portions of two other days, and the first day being excluded this made only twenty days (*Hunt v. Pooke*, 5 B. R. 161).

g. Or if he wilfully neglects or refuses to appear, on any rule or order requiring his appearance, to be examined as to his debts under any Statute or law in that behalf;

h. Or if he wilfully refuses or neglects to obey or comply with any such rule or order made for payment of his debts or of any part of them;

i. Or if he wilfully neglects or refuses to obey or comply with an order or decree of the Court of Chancery or of any of the judges thereof, for payment of money.

j. Or if he has made any general conveyance or assignment of his property for the benefit of his creditors, otherwise than in the manner prescribed by this Act; or if, being unable to meet his liabilities in full, he makes any sale or conveyance of the whole or the main part of his stock in trade or of his assets, without the consent of his creditors, or without satisfying their claims.

An assignment for the benefit of creditors not under or purporting to be under the Act, subjects the estate of the debtor to compulsory liquidation, and if proceedings are afterwards taken against the debtor to force him into insolvency the assignment will be void

as against the assignee (*Wilson v. Cramp*, 1 U. C. L. J. N. S., 217; 11 Grant, 444; *Calvin v. Tranchemontagne*, 14 L. C. J. 210).

And on a bill filed by the assignee in insolvency, the Court will order the delivery of all books of accounts, vouchers, deeds, papers, and documents, and all the goods and chattels, and also a conveyance of the land, to be made by the person, taking under the general conveyance or assignment (*Wilson v. Cramp*, *supra*).

Such an assignment has also been held void as against an execution creditor of the debtor who afterwards placed a writ of execution in the sheriff's hands (*Thorne v. Torrance*, 16 C. P. U. C. 445); affirmed in appeal, 18 C. P. U. C. 29).

In this case certain debtors executed a deed of assignment for payment of creditors, but not in accordance with the Insolvent Act of 1864. The defendant subsequently to this deed issued a writ of execution against the debtors, and then took proceedings in insolvency under the Act of 1864, against their estate for the general benefit of creditors. It was held that the assignment was an act of bankruptcy, and void, and could not be set up for any purpose, and that therefore the defendant, the execution plaintiff though petitioner in insolvency, could notwithstanding his proceedings in insolvency enforce his execution against the debtors of the estate to the postponement of the rest of the creditors. This decision was followed in *Rose v. Brown* (16 C. P. U. C. 477), where it was held that the *fi. fa.* of the execution creditor being in the sheriff's hands before the issuing of the attachment in insolvency, bound the goods at common law from its date, and under the Statute of Frauds from its delivery to the sheriff. But under the 83rd section of this Act, the execution creditor, in such a case as the above, would have no lien or privilege for the amount of his execution on the effects or estate of the debtor, if before the payment of the money to him by the sheriff, an attachment in insolvency issued or assignment was made, and the latter will supersede a writ of execution unless there is an actual payment over to the execution creditor of the money levied before the attachment issues or the assignment is made.

It has been held in the Province of Quebec that a creditor who has consented to his debtor, making an assignment otherwise

than under the provisions of the Act, cannot avail himself of such an assignment as a ground for obtaining a compulsory liquidation under the Act (*Whyte v. Cohen*, 14 L. C. J. 83); the consent doing away with the act of bankruptcy so far as the consenting creditor is concerned.

It has long been settled that an assignment by a trader of the whole of his property, or the whole substantially, and with only a colourable exception to secure, or, in satisfaction of, an existing debt, is fraudulent within the bankrupt law and an act of bankruptcy (*Siebert v. Spooner*, 1 M. & W. 714; *Lindon v. Sharp*, 6 M. & G. 895; *Lomax v. Buxton*, L. R. 6 C. P. 107).

The assignment of the whole of a debtor's property, even though made for the benefit of creditors generally, has always been held to be an act of bankruptcy (*Kettle v. Hammond*, Cooke 86; *Stewart v. Moody*, 1 C. M. & R. 777); and the express enactment in the present Act that it shall be so, has in no way altered the law (re *Wood* L. R. 7 Ch. 302).

The assignment of the whole of a debtor's property for the benefit of one creditor or several, to the exclusion of the others, is fraudulent; the necessary consequence of such an assignment being to defraud the excluded creditors (*Worsley v. De Mattos*, 1 Burr. 467; ex parte *Luckes*; re *Wood*, L. R. 7 Ch. 302; 41 L. J. Bank. 21). Not every transfer, however, of the whole of a debtor's property is fraudulent, for the cases have gradually established that the general proposition is subject to the following limitations:—

In *Rose v. Haycock* (1 Ad. & E. 460), *Baxter v. Pritchard* (1 Ad. & E. 456), *Whitwell v. Thompson* (1 Esp. 67, per Lord Kenyon), it was held that the sale of all a trader's property was not an act of bankruptcy, because there it was really intended to enable the trader to carry on business. Gradually it came to be held that a mortgage or an assignment, not by way of sale in the ordinary course of business, of the whole of a debtor's property, was not necessarily an act of bankruptcy (see *Whitwell v. Thompson*, Esp. 68, cited in M. & A. Bank. 2nd Ed., p. 76, as an authority for a new and doubtful doctrine).

But for a long time it was considered that to prevent such a

mortgage or assignment from being an act of bankruptcy, the object of the mortgage or assignment must have been to secure a present, or present and future advances; and that if the consideration of the assignment were wholly or partly an antecedent debt contracted without security, such an assignment was an act of bankruptcy (see *Graham v. Chapman*, 21 L. J. C. P. 173; *Bittleston v. Cooke*, 25 L. J. Q. B. 281; *Hutton v. Crutwell*, 22 L. J. Q. B. 78, where all the old cases on the subject will be found collected).

A long series of more modern cases, beginning with *Pennell v. Reynolds* (11 C. B. N. S. 716), and followed by *Mercer v. Peterson* (L. R. 3 Ex. 105; 37 L. J. Ex. 54); *Lomax v. Buxton* (L. R. 6 C. P. 107; 40 L. J. C. P. 150), have, however, conclusively established that an assignment, partly in consideration of an existing debt and partly as security for a further advance, is not necessarily, and as a conclusion of law (apart from evidence of fraudulent preference), an act of bankruptcy (see also *Kevan v. Mawson*, 24 L. T. N. S. 396; ex parte *Fisher*, re *Ash*, L. R. 7 Ch. 636; 41 L. J. Bank, 62).

The reason why a substantial present advance operates to prevent an assignment of the whole of the debtor's property from being an act of bankruptcy, is, that it is deemed equivalent to such a substantial exception of a part of a debtor's property from the assignment as would save that assignment from covering the whole of the debtor's property, and from being as such, an act of bankruptcy (see *Lomax v. Buxton*, L. R. 6 C. P. 107). A debtor, by a bill of sale, assigned to a creditor, in consideration of a then existing debt, and without any present consideration, the whole of his property, except a pension of 10s. 6d. a day, to which he was entitled as a military officer, retired from the service of the East India Company. It was held that the bill of sale was void, as against the trustee under the bankruptcy of the debtor, as it was practically an assignment of the whole of the debtor's property to secure a past debt, the pension not being property which would pass to the trustee (ex parte *Hawker*, 26 L. T. N. S. 54; L. R. 7 Ch. 214.)

An assignment of all a trader's effects, to secure a present ad-

vance, or present and future advances, or future advances *bona fide* made, or to be made, for the purpose of enabling him to carry on his business, is not an act of bankruptcy (*Bittlestone v. Cooke*, 2 Jur. N. S. 758); so also an assignment by a trader, of all his effects to secure an advance, to enable him to satisfy a pressing demand, and thus to continue his business, is not of itself an act of bankruptcy (re *Colemere*, L. R. 1 Ch. App. 128; *Lomax v. Buxton*, L. R. 6 C. P. 107); and if the advance be to pay off a subsisting charge on the property, the transaction will be protected, although the security is not transferred; but a new mortgage is executed (ex parte *Harris*, L. R. 19 Eq. 253); and this, although the person advancing the money had notice of an act of bankruptcy committed by the debtor (ex parte *Coates*, 31 L. T. N. S. 622). A security comprising all the debtor's property for an existing debt arising from a loan previously made, will not be an act of bankruptcy, if it is made in performance of an agreement entered into at the time of the loan (*Mercer v. Peterson*, L. R. 2 Ex. 304; ib. 3 Exch. 104; *Jones v. Harber*, L. R. 6 Q. B. 77; ex-parte *Fisher*, L. R. 7 Ch. App. 636; ex-parte *Izard*, L. R. 9 Ch. App. 271). But an agreement of this sort will not protect the transaction, if the giving a bill of sale is purposely postponed until the debtor is in a state of insolvency, in order to prevent the destruction of his credit, which would result from registering the deed. Such a postponement will be regarded as evidence to commit a fraud on the general creditors (ex-parte *Fisher, supra*); and where an assignment, by way of security, was executed upon an understanding that it was not to be registered under the Bill of Sales Act, 1854, but was to be renewed from time to time, it was held that a substituted bill of sale reciting the former deed, which was not itself fraudulent within the policy of the bankrupt law, but invalid because unregistered, could not be supported (ex-parte *Foxley* L. R. 3 Ch. App. 515; ex-parte *Stevens*, L. R. 20 Eq. 786). It is not necessarily evidence of fraud, in cases of an advance, that the property comprised in the security is large in proportion to the amount of the advance. But if the circumstances are such as to afford no reasonable expectation that the advance will enable the debtor to carry on his business, and both

parties know this, that fact will be evidence of a fraudulent intent (ex-parte *Fisher*, L.R. 7 Ch. App. 636). An assignment by a debtor of the whole of his effects, in consideration, partly of an existing debt and partly of an advance, is not an act of bankruptcy where the advance is of a substantial sum and made *bona fide* to enable the debtor to meet his engagements, and, if a trader, to carry on his business (*Bell v. Simpson*, 2 H. & N. 410; *Allen v. Bonnett*, L. R. 5 Ch. App. 577; ex parte *Winder*, L. R. 1 Ch. D. 290), and it is not necessary that the advance should be immediate, provided there is an agreement to make it and it is made (ex parte *Sheen* L. R. 1 Ch. D. 560; ex parte *King*, L. R. 2 Ch. D. 256). If, however, the circumstances of the case are such as to shew that the real object in making the advance was not to enable the debtor to continue his trade or meet his engagements, but to secure to the creditor the repayment of the debt previously owing to him, the transaction will be regarded as a fraud on the other creditors and an act of bankruptcy (ib). The principle on which sales by the debtor and securities for advances are protected is, that the debtor receives an equivalent for his property or for the security. It is not essential, however, to the validity of transactions of this sort by way of security, that the advance should be of equal value with the property charged, if it be made *bona fide* to enable the debtor, if a trader, to carry on his business (ex parte *King*, L. R. 2 Ch. D. 256). Neither is it essential that the equivalent should be a sum of money paid down. But if the debtor has something done for him to enable him to carry on his business that will be a sufficient equivalent, as where the drawer of bills of exchange took them up at maturity at the request of the acceptor (ex parte *Reed*, L. R. 14 Eq. 593; see also observations of Bramwell, B. in *Philps v. Hornstedt*, L. R. 8 Ex. 26; s. c. L. R. 1 Ex. D. 62): so also where the agreement was to supply goods on credit (ex parte *Winder*, L. R. 1 Ch. D. 290.)

Where, however, a creditor had levied execution by seizure of the debtor's goods, under circumstances which would have made the transaction an act of bankruptcy if a sale took place and the debtor made an assignment of all his effects to the judgment creditor, by way of security for his debt, in order to induce him to



withdraw the execution, this was held to be an act of bankruptcy, on the ground that if the law had been allowed to take its course, and a sale effected, another creditor might have taken proceedings in bankruptcy against the debtor and secured the proceeds for the benefit of the general creditors, and therefore such creditors derived no benefit from the withdrawal of the execution (*Woodhouse v. Murray*, L. R. 4 Q. B. 27).

An assignment of all a debtor's property for a past debt is an act of bankruptcy. A merely nominal exception of part of the property will not prevent this; but an exception of a substantial part will prevent it. If the assignment includes substantially all the property, and is made in consideration of a past debt and of a further advance made at the time, the further advance, if substantial, has the same effect as a substantial exception out of the property. If, therefore, there is a substantial further advance made *bona fide* for the purpose of enabling the debtor to carry on his trade, the assignment will be good (ex parte *King*, L. R. 2 Ch. D. 256).

On the 11th September, Martha Hurst and Richard Hurst, her husband, made a chattel mortgage to the Dominion Bank to secure a previous indebtedness of Richard Hurst to the bank. No future day was named for the payment, and the proviso to hold possession till default was struck out. A writ of attachment in insolvency was issued against Richard Hurst on the 4th October, 1875, and the assignee took possession of the mortgaged chattels then in the debtor's possession. The bank claimed the chattels under the mortgage, which the assignee contended was void as against the creditors.

The bank thereupon petitioned for an order, directing the assignee to deliver up the goods. It appeared also that the debtor had long previously been embarrassed; that most of his paper was under protest; that his real estate was mortgaged to the bank and others; but he had been frequently asked to reduce his indebtedness, and the mortgage was given by him after repeated solicitations and upon a threat of legal proceedings.

The intention was that all the personal property of the mortgagor should be included in the mortgage, and the bank were not

aware when it was given that the mortgagor was insolvent, but no fresh advance was made, nor any promise given of such advance. The evidence of pressure in the case was uncontradicted; but there was no promise at the time the money was advanced to give the mortgage.

The Judge in Insolvency declined to grant the order petitioned for, holding the mortgage void under sections 130 and 133 of the Act.

Harrison, C. J., under these circumstances, after an elaborate review of the English and Canadian authorities bearing on the subject, held, that the chattel-mortgage was fraudulent and void, as against creditors, on the ground that it covered the whole of the debtor's trade property and enabled the creditor to put a stop to his business (*re Hurst*, 6 P. R. U. C. 329; see also *ex parte Trevor*, L. R. 1 Ch. D. 297).

The result of the authorities is that where a debtor assigns his whole property as a security for a past debt only, it is an act of bankruptcy, whatever the motives of the parties may have been. If there is, also, a further advance, it is not a question whether the further advance is great or small, but whether there was a *bona fide* intention of carrying on the business (*ex parte Ellis*, L. R. 2 Ch. D. 797, *Mellish*, L. J.; see also *Kalus v. Hergert*, 1 Appeal Reports [Ont.] 75, and cases there cited); but the crucial test in all these cases is the existence of a *bona fide* intention to carry on the business, and where the evidence does not satisfy the Court that the transaction was entered into with the *bona fide* expectation and intention that the business would be carried on through the relief afforded by the fresh advance, but on the contrary, that it was a mere device to enable the mortgagee, or holder of the security, to receive payment in full, the security will be void, not only as to the antecedent debt, but also as to the fresh advance (*Kalus v. Hergert*, *ubi supra*; as to being void *in toto* under such circumstances, see *Coates v. Joslin*, 12 Grant, 524).

A sale by a trader of all his stock in trade and effects to a *bona fide* purchaser, at a fair price, is not an act of bankruptcy (*Baxter v. Pritchard*, 1 Ad. & E. 456). The debtor gets an equivalent in

value for his property, and the effect of the transaction is merely to change its character; and in a case of this sort, it is immaterial that the trader intended at the time of the sale to misapply the purchase money, if the buyer, at the time of the transaction, had not notice of such intention, or any reasonable ground to suspect that the seller meant to get the money for himself in fraud of his creditors (ib. and see *ex parte Wilson*, 29 L. T. N. S. 860). If the transaction is not a real *bona fide* sale, but a mere contrivance to give a preference to the pretended purchaser, although it is not sale of the whole of the debtor's effects, it will be fraudulent and void as against the general creditors (*ex parte Pearson*, L. R. 8, Ch. App. 667). So also, if the object of the transaction is to protect the goods against the general creditors, for the benefit of the debtor, it will be fraudulent and void as against such creditors. (*Graham v. Furber*, 14 C. B. 410).

In *Brooks v Taylor* (26 C. P. U. C. 443) the Court declared that independently of the element of fraud which appeared in that case the sale of the whole of a trader's stock in trade is in itself an act of bankruptcy.

The conveyance of the whole property of a debtor affords a very violent presumption of a fraudulent intent so far as existing creditors are concerned. When the effect necessarily is to delay creditors the intent ought to be presumed. When the defence is that the property was conveyed in pursuance of a secret trust under which it was held and parol evidence by the Statute of Frauds cannot be admitted to prove such trust so that, in case of attachment or bankruptcy, before the conveyance was made, the conveyance would be conclusively held to be in the debtor, it is questionable whether he ought to be admitted to show this alleged trust even on the question of intent. When the creditor is a witness, the fact that he has acted in a harsh and oppressive manner towards the debtor may be shown in evidence, for the purpose of affecting his credibility (*re Alexander* 4 B. R. 178; *Thornhill v. Link*, 8 B. R. 621).

An assignment for the equal benefit of all creditors is in contravention of the spirit and policy of the Bankrupt Act, even when made in good faith. The intention of the Act clearly is, that

when a failing debtor is conscious of his inability to prosecute his business and pay his debts, he should at once subject his property to such a disposition as the Bankrupt Act has provided for. The property then becomes a sacred trust for the benefit of creditors, who have a right to insist that it shall be administered, not according to the wish or preference of the insolvent, or in accordance with the insolvent laws of a State, but according to the provisions of the national Bankrupt Act. Practically an assignment defeats or delays the operation of the Act. It deprives creditors of a legal right under the Statute, and is clearly in contravention of its spirit and its letter. It commits the disposition and the distribution of the property to an assignee selected by the debtor, and deprives his creditors of the right given them by the Bankrupt Act to choose an assignee for that purpose. It takes from the Courts of Bankruptcy the legal supervision and control—the legal and equitable jurisdiction—which they, under the Act, are to exercise in respect to such property, and the hostile claims and adverse interests of the creditors, and the marshalling of the debtor's assets as well as in respect to his conduct, property, and person; and it also defeats its operations in many other respects, by preventing the property assigned from being brought within the operation and protection of other provisions of great importance, the infraction of which is punishable as a heinous crime. Such an assignment necessarily and absolutely defeats the operation of the Bankrupt Act. The provisions of the Statute fully authorize, if they do not absolutely require, this construction (*Perry v. Langley*, 1 B. R. 559; s. c. 1 L. T. B. 34; s. c. 7 A. L. Reg. 429; in re *S. T. Smith*, 3 B. R. 377; s. c. 1 L. T. B. 147; s. c. 4 Bt. 1; *Anon.* 3 B. R. 78; *Spicer et al. v. Ward et al.* 3 B. T. 512; *Curran v. Munger*, 6 B. R. 33; in re *Goldschmidt*, 3 B. R. 165; s. c. 3, Bt. 379; in re *Pierce & Holbrook*, 3 B. R. 258; s. c. 16 *Pitts* L. J. 204; in re *Randall & Sutherland*, 3 B. R. 18; s. c. 2 L. T. B. 69; s. c. *Deady* 557; *Wells et al.* 1 B. R. 171; s. c. 1 L. T. B. 20; 7 A. L. Reg. 163; in re *Burt*, 1 Dillon 439; *contra Perry v. Langley*, 2 B. R. 596; s. c. 8 A. L. Reg. 427; in re *Kintzing*, 3 B. R. 217; *Smith v. Teutonia Ins. Co.* 4 C. L. N. 130).

k. Or if he permits any execution issued against him under which any of his chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied till within four days of the time fixed by the sheriff or officer for the sale thereof, or for fifteen days after such seizure,—subject, however, to the privileged claim of the seizing creditor for the costs of such execution, and also to his claim for the costs of the judgment under which such execution has issued, which shall constitute a lien upon the effects seized, or shall not do so, according to the law as it existed previous to the passing of this Act, in the Province in which the execution shall issue.

Persons who are parties or privies to a deed or disposition of property, operating as an act of bankruptcy, and persons claiming under them, cannot set it up as an act of bankruptcy, (ex parte *Stray*, L. R. 3 Ch. App. 374; re *Baker's Trusts*, L. R. 10 Eq. 559), unless indeed the deed be fraudulent as against the person impeaching it, as for instance on the ground of a secret preference given to some particular creditor (ex parte *Marshall*, 1 M. D. & D. 575). Deeds which are fraudulent under the Statute 13 Eliz. chap. 5, and also deeds which are fraudulent within the policy of the bankrupt law, may be impeached, or used as acts of bankruptcy, by any person who was a creditor of the grantor or settlor at the date of the transaction (*Oswald v. Thompson*, 2 Exch. 215); provided he was not a party or privy to the deed. It has been questioned whether persons who have become creditors subsequently, can impeach such deeds. It may, however be considered as now settled, that such creditors are entitled to the benefit of proceedings instituted by creditors at the date of the deed (ex parte *Philpott*, De Gex 346; *Barling v. Bishopp*, 6 Jur. N. S. 812); and also that subsequent creditors, or the assignee as representing them, can impeach such deeds if there is a debt remaining due, which was owing at the date of the deed (ib), or if the deed appears to have been executed for the purpose of defeating future, as well as present creditors (*Jenkyn v. Vaughan*, 3 Drew, 419; *Ware v. Gardner*, L. R. 7 Eq. 317). But if the assignee in insolvency applies to the Court to compel the holder of a deed, fraudulent as against creditors, to deliver up to him the proceeds of the sale of the goods comprised in the deed, he affirms the sale, and cannot afterwards maintain an action of trover for the difference between

the value of the goods and the amount realized (*Smith v. Baker*, L. R. 8 C. P. 380).

4. If a debtor ceases to meet his liabilities generally as they become due, any one or more of his creditors for unsecured claims of not less than one hundred dollars each, and amounting in the aggregate to five hundred dollars, may make a demand upon him either personally or at his chief place of business, or at his domicile, upon some grown up person of his family or in his employ (Form A.), requiring him to make an assignment of his estate and effects for the benefit of his creditors. But the said demand shall not be made until the creditor or creditors making the same shall have filed with the clerk or prothonotary of the court, in which the proceedings in liquidation (if any) will be carried on, his or their affidavit verifying his or their debt or debts, and that he or they is not, or are not, acting in collusion with the debtor, or to procure him any undue advantage against his creditors :

The creditor or creditors making such demand of assignment shall in such demand elect and appoint a domicile or domiciles, respectively, within the district or county in which such affidavit is filed, at which service of any answer, notice or proceeding may be served on him or them ; and the said clerk or prothonotary shall keep the original affidavit and give a certified copy to the creditor or creditors ; and such copy shall be annexed to the notice served on the debtor.

The 39th Vict. chap. 80, s. 2, amended this section, by adding, after the word "original," in the third line from the end, the word "affidavit."

Prior to the Act of 1869, in England it was held that a mere equitable debt, though proveable in bankruptcy, would not support a petition for adjudication (*ex parte Hylliard*, 1 Atk. 147 ; *ex parte Blencowe*, L. R. 1 Ch. App. 392) ; but the Act of 1869 provides that a sum due at law or in equity, provided it is a liquidated sum, will support a petition.

The debt, however, must be a sum due, and, therefore, a debt dependent on a contingency will not support a petition (*ex parte Page*, 1 G. & J. 100).

In Ontario "The Administration of Justice Act" of 1873 (36 Vict. chap. 8, s. 2) provides that any person having a purely money demand may proceed for the recovery thereof by an action at law, although the plaintiff's right to recover may be an equitable one only, and no plea, demurrer, or other objection on the ground that the plaintiff's proper remedy is in the Court of

Chancery, shall be allowed in such action. It would seem that a claim which comes within this Statute would be sufficient to authorise a demand under this section.

This section speaks of "liabilities generally." It does not in any way define these liabilities as commercial or non-commercial. The Act of 1864 (s. 3, ss. 2) referred to "commercial liabilities." As a trader may have debts not of a commercial nature, it is important to consider whether such debt can be made the foundation of a demand under this section. It was decided in Quebec, under sec. 14 of the Act of 1869, that a creditor of a debt of a non-commercial nature could make the demand (*Buchanan v. McCormick*, 19 L. C. J. 29). The debt in this case was for money loaned, secured by three deeds of obligation, and a judgment had also been obtained for part of the sum. The judgment had been appealed from, but the debtor afterwards gave a written consent that execution for the enforcement of said judgment should issue in due course of law, and gave security for costs only, and it was held that that was a sufficient debt on which to make a demand.

The Act in force in the United States declares that a trader who "has stopped or suspended, and not resumed payment within a period of forty days of his commercial paper," shall be deemed to have committed an act of bankruptcy. On this clause it has been held that if a man declines to pay solely because he is not liable to pay, or because he has a valid claim against the paper, or a set-off that is not a stoppage or suspension within the meaning of the Act (re *Westcott*, 7 B. R. 285; re *Thompson*, 3 B. R. 185), the Court of Bankruptcy will not sit to try the validity of the reasons for non-payment of the note or bill. It is not a Court for the mere collection of debts, and each case must be considered by itself in connection with the circumstances surrounding it. The non-payment of one piece of paper is not in itself suspension for there may be good reason for it. But when he fails to pay for want of means, and continues unable to pay, he has suspended within the meaning of the Act, although but a single cheque is shown to have laid over unpaid

for forty days (*McLean v. Brown*, 4 B. R. 585; re *Hercules Insurance Company*, 6 B. R. 338).

But it is not sufficient to defeat the operation of the bankrupt law to simply deny liability upon the commercial paper. The party must satisfy the Court that he has good reason to dispute his liability, and that his liability is involved in doubt, at least before a Bankrupt Court will refuse to proceed (re *Munn*, 7 B. R., 468).

It is enough that the alleged debtor could, and did, honestly entertain the belief that he was not legally bound to pay the paper till it should be so adjudged. Such a case is not one for an adjudication of bankruptcy, but for a suit on the paper in the proper tribunal (ib.; re *Westcott*, 7 B. R. 285).

A suspension which has taken place on account of an injunction against the debtor, restraining him from making any transfer or disposition of his property is not an act of bankruptcy (re *Pratt*, 9 B. R. 47). Evidence that the debtor is a man of means, and has met his other paper as it became due, may tend to rebut the presumption of insolvency and to shew that the failure to pay the note was from other causes, not making him amenable to the Bankrupt Act (re *Sykes*, 5 Biss. 113).

A corporate body ought to make the demand in its corporate name (re *Calthrop*, L. R. 3 Ch. App. 252), and in England it is held that an incorporated joint stock company may file a petition in bankruptcy against one of its shareholders (ib.).

According to Robson (3rd. Ed. 170), an infant cannot be a petitioning creditor by reason of his liability for the costs of the petition. Under section 5 a creditor making a demand may be condemned to pay treble costs if the demand is made without reasonable grounds. It would, therefore, seem that an infant cannot legally make the demand under this section. Under the Statute of Ontario (35 Vic. chap. 16, sec. 2), all the wages and personal earnings of a married woman, and any acquisitions therefrom, and all proceeds or profits from any occupation or trade which she carries on separately from her husband, or derived from any literary, artistic or scientific skill, and all investments of such wages, earnings or property, shall thereafter be free from the debts or dispos-



itions of the husband, and shall be held and enjoyed by such married woman, and disposed of without her husband's consent, as fully as if she were a *feme sole*; and no order for protection shall thereafter become necessary in respect of any such earnings or acquisitions. Under this Statute, a married woman would seem to be entitled to join in a demand on a debtor, in respect of a debt due to her in business, carried on separately from her husband. In fact, a married woman would seem to have this power in any case in which she is entitled to the debt for her separate use, or in which she can bring an action or maintain a suit as a *feme sole* for the recovery of the debt (see *Summers v. City Bank*, 43 L. J. C. P. 261; see Robson, 3rd Ed. 170).

The Act does not contain any provision expressly relating to denizens and aliens; but, without such provision, an alien or denizen would seem to be entitled to make a demand against a debtor amenable to the jurisdiction of the court (Robson, 3rd Ed. 171). But an alien enemy cannot do so, unless it be in respect of a debt contracted by a British subject under the sanction of the Crown (see *Williams v. Nunn*, 1 Taunt. 278; ex parte *Pascal*, 24 W. R. 263).

It is to be observed that no creditor can join in the demand under this section, unless he has an unsecured claim of not less than one hundred dollars. Though the language of the Statute is not very clear, it seems a single creditor whose claim amounts to or exceeds five hundred dollars may make the demand. If a debtor has no creditor whose claim amounts to two hundred dollars who can make the affidavit required under section 9, and the aggregate of the claims of his creditors (whose claims are over one hundred dollars) does not amount to five hundred dollars, he cannot be placed in insolvency under the Act. Such a debtor may be subject to the provisions of the Act, but there is no person competent to put the machinery of the Act in motion, as the Act deprives the debtor of the power to avail himself of its provisions.

"Unsecured claims" in this section must mean unsecured for the amount for which the demand is made. It does not debar a

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secured creditor as such from joining in the demand (see sections 9 and 106 and notes thereon).

The Statute of Ontario (35 Vict. chap. 12) provides that every debt and chose in action arising out of contract shall be assignable at law, by any form of writing, subject to such conditions or restrictions with respect to the right of transfer as may be contained in the original contract, and the assignee thereof shall sue thereon, in his own name, in such action and for such relief as the original holder or assignor of such chose in action would be entitled to. There would seem no doubt that the assignee under this Statute may make the demand, when the assignment is *bona fide* made before the demand, and not for the purpose of enabling the assignee to take proceedings under the Act. The 29 section only refers to claims purchased after insolvency. In England the equitable assignee of a debt not assignable at law may petition alone (ex parte *Cooper*, 32 L. T. N. S. 780).

The Act of 1869, in the sections corresponding to the 4th and 9th of the present Act, used the word "claimant" instead of the word "creditor." But under the Act of 1869, the word claimant was held to mean creditor (*Dever v. Morris*, 1 Pugsley, 270).

This case of *Dever v. Morris* settles an important point in reference to insolvency proceedings. The creditor making the demand has not the sole control over it. The other creditors have a right to avail themselves of the demand, though the creditor making it should accept payment of the debtor, or settle the proceedings with him.

M., a creditor of defendant, made a demand upon him to assign his estate, for the benefit of his creditors, under the 14th section of the Act of 1869. No petition against this demand was presented within five days, as required by the Act, but after that time the defendant settled his debt with M., who took no further proceedings. The Court held that the estate of the defendant was nevertheless subject to compulsory liquidation, and that the demand of M. enured to the benefit of the other creditors of the defendant, the creditor making the demand having no right or power to release, absolve, or discharge the estate of the insolvent from the liability to compulsory liquidation which had ac-

crued from the non-contestation of the demand (*Dever v. Morris*, supra, s. c. Stephen's Digest, N. B. Reports, 223; see *ex parte Brigstock*, L. R. 4 Ch. D. 348).

So, under the Act of 1869, it was held that after the expiration of three days from the return day of the writ of attachment, the plaintiff could not settle with the defendant or withdraw his writ. The estate was then in insolvency, and subject to compulsory liquidation, and the creditors had acquired such an interest in the estate as entitled them to have a meeting held under the 27th section of that Act, and the writ could not be withdrawn by the creditor suing it out, so as to disentitle another creditor to intervene under this 27th section (*Worthington v. Taylor*, 10 U. C. L. J. 333; *Logie, Co. J.*).

This section does not expressly provide that the affidavit may be made by an agent. The 105th section refers to proceedings in insolvency, and would seem more properly to apply to affidavits required after the issue of a writ of attachment, or the making of an assignment. There seems no objection, however, to an affidavit by an agent, having a personal knowledge of the facts. The demand might also, it is apprehended, be signed by a duly authorized agent.

There is no form of affidavit given by this section. In practice, the affidavit required by section 9, form B., is generally used. The third paragraph of this affidavit is not strictly applicable, nor is it necessary. It refers to some act of bankruptcy committed by the debtor.

Whereas, under this section, an act of bankruptcy may not be committed when the affidavit is made, and it is only in the event of the contingencies specified in section 7 arising, that the estate of the debtor is liable to be placed in insolvency under section 9 of the Act. The form of affidavit required by section 9 gives, in the style of cause, the residence and description of the plaintiff and defendant. These would not be necessary in the affidavit under this section, and it would seem that the affidavit under this section need not be entitled in any cause. *Sharp v. Mathews* (5 U. C. P. R. 10) would not apply in this case. It was decided on the ground that the form was intituled in a cause, and the body of the

affidavit referred to a cause. There the opinion of the Court was that the plaintiff properly followed the form given.

If the claim of one of the creditors is based upon a transfer of a debt to him by a third party, but the transfer is not signified to the debtor until several days after the demand, this will not be sufficient to support the demand, for at the time of the demand the debtor could not know of the transfer (*Turgeon v. Tuillon*, 13 L. C. J. 19).

As this section is worded, it would seem that if the debtor is out of the county or district in which he has his chief place of business or domicile, he may be served with a demand personally. In other words, if there is personal service of the demand on the debtor, it is not necessary that the service should be either at his place of business or domicile. To whom would the assignment be made in such case? According to the decision in *New Brunswick*, to be hereafter referred to, the Judge having jurisdiction in the county or district in which the demand was served could alone determine its validity. It would seem under the 14th section of the Act, that there is no authority for an assignment to any official assignee not appointed for the place of the debtor's domicile or chief place of business. A further question arises in such a case as the above. In what Court would the affidavit required to be sworn to under this section be filed?

It would seem it should be filed in the county where the debtor resides or carries on business. The intention of the Act is, that proceedings should be initiated in that county or district, and the authorization of service on the debtor personally would seem intended to meet cases where the debtor had removed to some other part of Canada, and there was no other person who could be served. Besides if, on neglect of assignment by the debtor, the creditor applied for an attachment, under section 9, he could only apply to the Judge of the county or district where the trader has his chief or one of his principal places of business. The proceedings in liquidation would be carried on in that county or district, and the affidavit under this 4th section, must be filed in that county or district. The Act in force in the United States provides that the petition in bankruptcy is to be addressed to

the Judge of the district in which the debtor "has resided or carried on business." Where the debtor carries on business would surely be his place of business within the meaning of our Statute. On this Statute, the American courts have declared that in a certain sense the place of the most transient stoppage, a mere purchase, a bargain made by a man on his transit through a place, would render it for the time being his place of business. Persons resorting to market towns to dispose of produce, or make purchases, would have, in literal acceptation, their place of business there in conducting such transactions. It cannot, however, satisfy this provision of the law to prove the fact that the bankrupt is doing some kind of business at the place where the petition is filed, if his legal residence is different. It must appear distinctly that he has a fixed and notorious employment pursued by him in such a manner as to denote a place of business established by him distinct from his place of residence. A fugitive or equivocal occupation that may continue for a long period, or may terminate instantaneously without any outward change or indications calculated to mark its continuance or character, will not be sufficient to satisfy this provision of the law (re *Kinsman*, 1 N. Y. Leg. Obs. 309).

An agent who is merely temporarily executing his agency in a district does not have a place of business in the district (ib).

In its broadest sense, the term "business" includes nearly all the affairs in which either an individual or a corporation can be actors. Indulgence in pleasure, participation in domestic enjoyment, and engagement in the offices of merely personal religion may be exceptions in the case of an individual, but the employment of means to secure or provide for these would to him be business, and to a corporation these exceptions can have no application. The conduct of any and all of the affairs of a corporation is business. There are, in the carrying on of a business, many affairs which are merely incidental, and which may be and often are transacted elsewhere than at the place where the business—that which is the real design and purpose or object in view—is located, and such transactions may be of such frequent and even daily occurrence as to require an agency of considerable duration.

Such transactions are not a carrying on of business in the sense of the law. "Carrying on business" looks to the scheme and purpose to which such transactions tend, and not to the incidental transactions themselves. The debtor may find it necessary or expedient in aid of his business, to employ agents or agencies in other places than those in which his business is carried on; but the transactions of such agents are only collateral or incidental. They do not in a just sense constitute the business of the debtor (re. *Ala. & Chat. R. R. Co.*, 6 B. R. 107; 9 Blatch. 391).

Under this section of the Act, the demand may be made either at the domicile or at the chief place of business of the debtor. Section 9 speaks only of the chief or one of the principal places of business of the debtor, while section 14 again seems to refer to domicile as distinct from the place of business of the debtor; and it would seem that the term is used in this sense in the Act, except in the latter part of the 4th section, in reference to the domicile for service.

By the term "domicile" in its ordinary acceptation is meant the place where a person has his home. In this sense the place where a person has his actual residence, inhabitancy, or commorancy is sometimes called his domicile. In a strict and legal sense, that is properly the domicile of a person where he has his true fixed permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning (*animus revertendi*).

Two things then must occur to constitute domicile—first, residence, and secondly, the intention of making it the home of the party. There must be the fact and the intent, for, as Pothier has truly observed, a person cannot establish a domicile in a place except it be *animo et facto*. From these considerations and rules, the conclusion may be deduced that domicile is of three sorts; domicile by birth, domicile by choice, and domicile by operation of law. The first is the common case of the place of birth, *domicilium originis*; the second is that which is voluntarily acquired by a party, *proprio motu*; the last is consequential, as that of a wife arising from marriage (Story's *Conf. of Laws*, 346). The best definition as applied to an acquired domicile is,—that place

in which a man has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce him to adopt some other permanent home (*Lord v. Colvin*, 4 Drew., 366, see Wharton's Law Lexicon, 6th Ed. 310).

5. If the debtor, on whom such demand is made, contends that the same was not made in conformity with this Act, or that the claims of such creditor or creditors do not amount to one hundred dollars each or to five hundred dollars in the aggregate, or that they were procured in whole or in part for the purpose of enabling such creditor or creditors to take proceedings under this Act, or that the stoppage of payment by such debtor was only temporary, and that it was not caused by any fraud or fraudulent intent, or by the insufficiency of the assets of such debtor to meet his liabilities, he may, after notice to such creditor or creditors (but only within five days from such demand), present a petition to the judge praying that no further proceedings under this Act may be taken upon such demand, and, after hearing the parties and such evidence as may be adduced before him, the judge may grant or reject the prayer of his petition, with or without costs against either party, but if it appears to the judge that such demand has been made without reasonable grounds, and merely as a means of enforcing payment under colour of proceeding under this Act he may condemn the creditor or creditors making it to pay treble costs. L. J. 41  
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The 4th section, as we have seen, authorizes a demand on the debtor when he is out of the county in which he resides, provided the demand is made upon him personally. In such case it has been held in New Brunswick, that the County Court Judge of the county in which the debtor is at the time of the service of the demand is the proper party to hear the petition under this section, although the debtor may reside and do business in another county (ex parte *Thomas*, 2 Hannay, 162, 163). The writer disapproves of the decision in this case as applied to the present Act. Under section 2 (d) "Judge" means a judge having jurisdiction in the county or district where the proceedings shall be had under the Act. As we have already seen, the proceedings must, under section 4, be had in the place of the debtor's domicile or chief place of business, and the creditor must appoint the domicile for service in this place. The debtor would be required to serve his

petition and notice there, and it certainly appears to the writer that the judge of the domicile for service is "the Judge" contemplated by this section.

When a Statute fixes the time within which an act must be done, the Courts have no power to enlarge it, although it relates to a mere question of practice: so where an appeal to be valid must be made within ten days, it is void if taken on the eleventh (ex parte *Ostrander*, 1 Denio 680; *Bleecker v. Wiseburn*, 5 Wend. 136; as to computation of time, see *Hood v. Dodds*, 19 Grant, 639-642).

It would seem, under this section that, the petition must be presented within the five days and, as by the 108th section, one clear day's notice must be given, the notice would require to be given on the third day, otherwise there could be no presentment on the fifth.

Where a demand was made under the 14th section of the Act of 1869, requiring a debtor to make an assignment for the benefit of his creditors, and the debtor did not, within five days after the demand, present a petition, under the 15th section, to stay proceedings, it was held that his estate on the expiration of such five days became subject to compulsory liquidation, though on the same day that the writ issued, the debtor made a voluntary assignment under the Act. In other words if the debtor allows the five days to elapse he cannot afterwards make a voluntary assignment which will prevent his estate being placed in compulsory liquidation, and a petition presented, after the expiry of the five days, to stay proceedings on the ground of the debtor having made a voluntary assignment is too late (*Thomas and Martin*, 17 L. C. J. 11, confirming s. c. 15 L. C. J. 236-7; 7 C. L. J. N. S. 302).

Two creditors, whose claims together amounted to five hundred dollars, made a demand against their debtor for an assignment of his estate and effects under the Act of 1864, section 3, sub-section 2, and it appeared in evidence on the debtor's petition to stay proceedings that one of the creditors had made the demand solely in order to obtain payment of the amount due him. The Court held that the demand was "made without reasonable



grounds and merely as means of enforcing payment" and was therefore contrary to section 3, ss. 3, and proceedings were consequently stayed (*Lacombe v. Lanctot*, 16 L. C. R. 166; 1 L. C. L. J. 110).

It would seem that this power to condemn the creditor to pay treble costs is merely cumulative, and does not interfere with any remedy which the debtor may have at the common law. It would seem that an action might be maintained for a malicious prosecution if the demand were served without reasonable and probable cause, and merely as a means of enforcing payment (see *Johnson v. Emerson*, L. R. 6 Exch. 329; 25 L. T. N. S. 337).

It would not be sufficient in an action for malicious prosecution to allege that the demand was served maliciously, but it would be necessary to go farther and state that there was no reasonable or probable cause for serving it. The demand could not amount to a libel unless it was published to a third person. A party could not be sued for serving a demand of this kind upon the plaintiff personally, unless there was want of reasonable or probable cause, nor could he be treated as having published a false and malicious libel by publishing it to the plaintiff himself. The demand being a legal proceeding would be *prima facie* privileged, and no action would lie for delivery of it to a third person for service on the plaintiff, unless upon proof of express malice; but if a party without having any debt due to him, and knowing that there was no debt due to him, chose to put such a demand into the hands of a third person for the purpose of being served, that would be a publication and might amount to a libel if express malice were proved, *Bank of B. N. A. and Strong*, L. R. 1 P. C. D. 307, 312).

The *onus probandi* of shewing that the stoppage of payment was only temporary and not caused by any fraudulent intent or the insufficiency of assets to meet liabilities is on the insolvent when he applies under this section. To do this it seems he must show he is not insolvent, that he is possessed of property, out of which the claims may be paid, and he must produce a schedule of assets and liabilities (*McCreedy and Leamy*, 11 L. C. J. 193).

So, in the United States it has been held that if the debtor is unable to pay his debts as they become due, the burden of

proving that his property is sufficient to pay his debts rests upon him (re *Ryan*, 2 Saw. 411).

A third party cannot object to the regularity of the proceedings taken against a debtor under the Insolvent Act of 1869. In this case the property claimed by the third person had been seized under a writ of attachment, and it was held that he must resort to his common law remedy therefor, and could not proceed summarily under section 125 of the Act (*Clementson v. Hammond*, East. T. 1871; Stephen's Digest N. B. Reports, 227).

When the Court sees that a bankruptcy petition has been made use of for an inequitable purpose, as for instance to extort money from the debtor, it will refuse to make an adjudication, even though there is a good petitioning creditor's debt, and an act of bankruptcy has been committed (re *Davies*, L. R. 3 Ch. D. 461).

The 84th section of the English Act of 1869 gives the Court power in certain cases to annul an adjudication of bankruptcy. If there are no assets, and the bankruptcy is a mere sham, it ought to be annulled (ex parte *English J. S. Bank*, L. R. 6 Ch. App. 79; see as to annulling, ex parte *Staff*, L. R. 20, Eq. 773; ex parte *Ashworth*, L. R. 18, Eq. 705; *Revell v. Blake*, L. R. 7 C. P. 300; ex parte *Hooper*, 34 L. T. N. S. 262; ex parte *Lindsay*, L. R. 19 Eq. 52; ex parte *Thoday*, L. R. 2 Ch. D. 229; ex parte *Foster*, L. R. 10 Ch. App. 59; ex parte *Walton*, L. R. 10 Ch. App. 215).

6. If at the time of such demand the debtor was absent from the Province wherein such service was made, application may be made after due notice to the creditor or creditors, within the said period of five days to the judge on his behalf, for an enlargement of the time for either contesting such demand or for making an assignment; and thereupon, if such debtor has not returned to such Province, the judge may make an order enlarging such period and fixing the delay within which such contestation or assignment shall be made; but such enlargement of time may be refused by the judge if it be made to appear to his satisfaction that the same would be prejudicial to the interest of the creditors.

Probably any person who may, under the Act, be legally served with the demand, has the power to apply, under this section, on

behalf of the debtor. This section does not say that the application must be by petition, or that it must be presented within the five days, but it is presumed that this is what is meant, and the observations already made as to section five will apply to this also. The judge to be applied to, in this instance, would clearly be the judge of the domicile.

7. If such petition be rejected, or if, while such petition is pending, the debtor, without the leave of the judge, or otherwise than on the terms prescribed by him, continues his trade, or proceeds with the realization of his assets, or if no such petition be presented within the aforesaid time, and the debtor during the same time neglects to make an assignment of his estate and effects for the benefit of his creditors, as hereinafter provided, his estate shall become subject to liquidation under this Act.

Under this section the liability to compulsory liquidation is so absolute, under the circumstances stated, that it cannot, as we have already seen, be waived by the creditor making the demand (*Dever v. Morris*, 1 Pugsley, 270). The policy of the Act is that the creditor making the demand is acting in the interest of the general body of creditors, and he cannot hold the demand in abeyance, or use it for his private purposes. If he does so, he is punishable at common law, as well as by the express provision of the Act (see ante 51-2.).

If the debtor wishes to continue his trade during the pendency of the petition, he must apply to the judge for leave to do so; on neglect to do so, his estate will become subject to liquidation under the Act; but proceedings must be taken under section 9, upon the estate becoming liable to liquidation under this section.

8. No such proceedings as aforesaid shall be taken under this Act to place the estate of an insolvent in liquidation, unless the same are taken within three months next after the act or omission relied upon as subjecting such estate thereto; nor after a writ of attachment in liquidation has been issued while it remains in force; nor after an assignment has been made under this Act.

This section does not apply to continuous acts of bankruptcy, such as remaining out of Canada under section 3 (b) (*ex parte Bunney*, 1 De G. & J. 309; 3 Jur. N. S. 1141); so the non-pay-

ment of commercial paper at maturity and the continued suspension and neglect of payment are a continuous act of bankruptcy. The debtor, in such case, is in a state of suspension and non-resumption of payment. His duty to pay is just as definite on any day after the day on which his commercial paper is by its terms payable, as it is on that day; and on any such day, he is in the very position, as between him and the creditors, of neglecting his duty, suspending, keeping in suspense, and not resuming payment, and whether his continued suspension and non-resumption of payment be termed a continuous act of bankruptcy, or be regarded as daily successive acts of bankruptcy, is not material. So long as it continues, the creditors may avail themselves of it as an act of bankruptcy, committed as truly within the preceding three months as on the day on which the debtor violated his commercial obligation (re *Raynor*, 7 B. R. 527).

It is probable that the acts of bankruptcy mentioned in section 3 (*g*, *h* and *i*) are continuous so long as the debtor neglects to comply with the rules and orders therein mentioned.

In Quebec, it has been held that a general conveyance or assignment which would be an act of bankruptcy under section 3 (*j*) of the Act, does not authorize proceedings to be taken in compulsory liquidation after the expiration of three months from the date of the assignment (*Hutchins v. Cohen*, 14 L. C. J. 85); and under this 8th section it would appear that proceedings to place the estate of an insolvent in liquidation must be taken within three months next after the act or omission relied upon as subjecting such estate thereto, otherwise the lapse of time will purge the act of bankruptcy. If a deed executed by a debtor cannot be set aside under the statute, 13 Eliz. chap. 5, or generally as fraudulent against creditors, but only on the ground that it is an act of bankruptcy within the policy of the bankrupt law, it will, under this section, become valid and unimpeachable after the lapse of three months from its execution, if, during that period, no proceedings have been taken to place the estate of the debtor in liquidation (*Allen v. Bonnett*, L. R. 5 Ch. App. 577; see also *Jones v. Harper*, L. R. 6, Q. B. 77).

## WRITS OF ATTACHMENT, ETC.

9. Any creditor upon his affidavit, or that of his clerk, or other duly authorized agent, that a trader is indebted to him in a sum proveable in insolvency of not less than two hundred dollars, over and above the value of any security which he holds for the same, and provided the affidavit or affidavits filed disclose such facts and circumstances as will satisfy the Judge or Prothonotary of the Superior or County Court, in the county, province, or district, as the case may be, in which such trader has his chief, or one of his principal places of business, that such trader is insolvent, and that his estate has become subject to liquidation under the provisions of this Act, and that he does not act in the premises in collusion with such trader nor to procure him any undue advantage against his creditors (Form B) shall be entitled to a writ of attachment (Form C) against the estate and effects of such trader, addressed to the Official Assignee of the county or district in which such writ shall issue, requiring such Official Assignee to seize and attach the estate and effects of such trader, and to summon him to appear before the court or a judge thereof on a day therein mentioned, to answer the premises. Concurrent writs of attachment may be issued when required, addressed to the Official Assignee of other counties or districts in any part of the Dominion other than the county or district in which the same shall be issued. Such writs shall be subject as nearly as can be to the rules of procedure of the court in ordinary suits, as to their issue and return, and as to all proceedings subsequent thereto before any court or judge.

Creditor in this section would seem to mean secured creditor as well as an unsecured creditor. Section 106 of the Act provides that the creditor, by his affidavit for the issue of a writ of attachment, shall put a value on his security, and he may exercise all the rights of an ordinary creditor in respect of the balance, after deduction of the value of his security. When a secured creditor applies for a writ of attachment under this section, his affidavit must shew that the Defendant owes him "not less than two hundred dollars over and above the value of any security which he holds for the claim" (*McDonald v. Cleland*, 6 P. R. U. C. 292).

So in the United States a secured creditor may be a petitioning creditor, but the amount at which his debt is to be reckoned is to be ascertained by deducting the value of the security (re *California P. R. R. Co.*, 11 B. R. 193).

In the United States it is held that a party has the right to purchase a claim in good faith with a view to enable him to join in

a petition in order to make up the number there required to file a petition in bankruptcy (re *Woodford*, 13 B. R. 575). But this is, as we have seen, one ground for setting aside a demand under section five of the Act.

The same number and amount of creditors must join in a proceeding to force a corporation into bankruptcy as is required in the case of an individual (re *Leavenworth*, S. B. 14 B. R. 82-92; re *Oregon B. & P. Co.*, 14 B. R. 394).

Proceedings under this clause are not in any sense proceedings merely for the collection or security of the particular debt of the creditor—they are for the benefit of all the creditors. The fact that the creditor making the affidavit has a provable debt to the requisite amount, is necessary to be shown for two purposes, viz. : 1st. To show that the alleged debtor occupies that relation; 2nd. To show that the creditor has the requisite qualifications to commence the proceedings. After the issue of the attachment, the plaintiff in the suit, or the creditor who initiates the proceedings, stands in no better or more favourable position than any other creditor. He must prove his debt in the course of the proceedings, the same as any other creditor. His debt may be opposed, adjudicated upon, and allowed, abated or expunged, the same as any other debt (re *Sheehan*, 8 B. R. 345; re *Freedley, Crabbe*, 544; re *Mendenhall*, 9 P. R. 380; re *Lacey*, 10 B. R. 477; see also *Dever v. Morris*, 1 Pugsley, 270; *Worthington v. Taylor*, 10 U. C. L. J. 333).

The debt must be contracted before the act of bankruptcy in respect of which proceedings are taken (ex parte *Sharp*, 3 M. D. & D. 490; ex parte *Hayward*, L. R. 6 Ch. App. 546). It would be manifestly unjust that a person who commits an act of bankruptcy, and who happens to have no creditors, or who pays all his creditors in full, should be liable to be made bankrupt on account of that act, by some person to whom he afterwards becomes indebted (ex parte *Hayward*, supra). The holder of a bill of exchange or promissory note, accepted, drawn, made or indorsed, by the bankrupt before the act of bankruptcy, though it be not actually endorsed to the holder until after such act, may take proceedings, founded on such bill or note after it becomes due and

payable, because the indorsement or assignment to the holder has relation to the original debt (*Glaister v. Hewer*, 7 T. R. 498; ex parte *Cyrus*, L. R. 5 Ch. App. 176).

The creditor authorized to take proceedings is one whose debt is provable. Under the 80th section of the Act, debts due but not payable at the time of the issue of the attachment, or the making of the assignment, have the right to rank on the estate—so a debt existing when the affidavit is made is sufficient to support the proceedings (*Phelps v. Clasen*, 3 B. R. 87). A claim for unliquidated damages would not be sufficient to ground an attachment nor any claim which is not provable under the Act. But a creditor whose debt is immature, may commence proceedings by attachment against his debtor who is insolvent in like manner as he might do if his debt were overdue at the time. But in a case where it appeared that the debtor did not owe more than \$100 beyond the creditor's debt, none of which was at the time due, the Court directed that he should be allowed further time to show if he could that he was not in fact insolvent and so not liable to have his estate placed in compulsory liquidation (re *Moore v. Luce*, 18 C. P. U. C. 446).

This case has been followed in New Brunswick, (re *Perks* 2 Hannay, 121), and it seems it would also be followed in the Province of Quebec (*Sinclair v. Ferguson*, 8 L. C. R. 239; *Leduc v. Tourigny*, 5 L. C. J. 123; *Wotherspoon*, Ins. Act, 35), and such is also the law in the United States. A debt not payable is provable, and being provable is sufficient to authorize proceedings (*Linn v. Smith*, 4 B. R. 46).

The decision in *Moore v. Luce*, supra, was under the Act of 1864. Section 3, ss. 7 of that Act, corresponding to this section of the present Act, did not use the words in the second line of this section, namely, that a trader is "indebted," but the affidavit the creditor was required to make under the Act of 1864 stated "that the defendant is *indebted* to the plaintiff." Mr. Justice Adam Wilson, who delivered the judgment in *Moore v. Luce*, pointed out the difference between the affidavit and the Statute itself, but declared that the statement in the affidavit, that the insolvent was "indebted," might be read in the light of the Sta-

tute, which in effect made an undue debt to be due, and so the party indebted, for the purposes of this Act. This reasoning would seem to show that the word "indebted" being used in the present Statute does not change its interpretation, and that the debtor may be "indebted" in respect of a debt not actually payable at the time of the issuing of the writ of attachment.

In *Moore v. Luce*, the debtor against whom the proceedings were taken was the maker, not the indorser of the note. Robson, in his treatise on bankruptcy (3rd edition, 173), says it seems questionable whether a bill before notice of dishonour will now be a good petitioning creditor's debt as against the drawer or indorser, who are only liable if the acceptor fails to take up the bill (*Brett v. Levett*, 13 East, 213); for until then it cannot be said that there is any debt due from the drawer or indorser. But as against the acceptor a bill before the time for payment has arrived would, *prima facie*, be sufficient, for a debt may be properly said to be due in the sense of being owed before it is actually payable (re *Bank of Hindustan*, L. R. 5 Ch. App. 402). The last Act in England speaks of "a sum due," and this has been held to mean a debt presently payable (ex parte *Sturt*, L. R. 13 Eq. 309).

Under the 80th section of the Act an indorser of a note, who is compelled to pay it, would seem entitled to issue a writ of attachment against the maker, and any surety who pays the debt for his principal may proceed under this section, so proceedings might be taken against a surety (see section 24). The holder of a note dated previously to proceedings in compulsory liquidation, need not prove that it was really made at its apparent date, and the fact that the note has been given as collateral security does not prevent the holder from adopting thereon proceedings in compulsory liquidation (*Hutchins v. Cohen*, 14 L. C. J. 85).

A writ of attachment may issue under this section against the members of a partnership after the dissolution of the firm (*City of Glasgow Bank v. Arbuckle*, 16 L. C. J. 218). The writ of attachment must be indorsed with a declaration show-



ing that it is issued under and by virtue of the order of the Judge of the Court granting it, but if this is not shown on the face of the attachment an amendment may be granted on payment of costs (*McInnes v. Brooks*, 1 U. C. L. J. N. S. 162 ; *Lawder, Co. J.*).

Under this section it is necessary that an affidavit should be made to ground the writ of attachment, and if the statement in writing does not amount to an affidavit the attachment must be set aside. Thus when a quaker was the plaintiff suing out the attachment, and his affirmation merely declared and affirmed that he was one of the society called quakers, without, also, solemnly, sincerely and truly declaring to the contents of the affirmation as required by the Con. Stat. U. C. chap. 32, s. 1, it was held that both these formalities were required to give the affirmation the effect of an affidavit, and the attachment was set aside (*Hillborn v. Mills*, 5 U. C. L. J. N. S. 41 ; *Hughes, Co. J.*).

If, therefore, an affirmation is made by a quaker, menonist, or tunker, or other person refusing from conscientious motives to be sworn, it is necessary that the affirmation should follow the form prescribed by the Statute of Ontario, (33 Vict. chap. 14, s. 1). This section requires that the party shall declare that the taking of an oath is according to his religious belief unlawful, and also that he does solemnly, sincerely and truly declare and affirm, &c. Under the 105th section, any affidavit required to be sworn in proceedings in insolvency may be sworn before any commissioner for taking affidavits, and it has been held that an affidavit for a writ of attachment sworn before the plaintiff's attorney in the proceedings was good under this section, the attorney being a commissioner for the taking of affidavits (*ib* ; *Hughes, Co. J.*).

This is contrary to the rule prevailing in the Superior Courts of Ontario, in which no affidavit can be read or made use of, if sworn before the attorney of the party in the cause on whose behalf the affidavit is made or before the clerk or partner of such attorney (Rule No. 114).

An affidavit to support an attachment should state definitely the act of insolvency relied on, and when the affidavits referred to the sale of some property in such an indefinite manner that it

was impossible to say whether the act relied on as subjecting the estate of the debtor to compulsory liquidation, was the sale of the property or an attempt to sell it, the attachment was set aside (*Royal C. Bank v. Matheson*, 6 U.C. L. J. N. S. 9).

This decision, though under the former Act, would probably still apply as by the affidavit, form B, the creditor is required to state concisely the facts relied upon as rendering the debtor insolvent.

An attachment may be issued under this section after demand made, under section 4 of the Act, if the petition to set aside the demand is rejected, or if the debtor continues his trade while the petition is pending, without the leave of the judge, or if no petition is presented within the proper time (see section 7). But it does not seem necessary in proceeding under this 9th section that a demand should be previously served on the debtor under section 4. If the debtor becomes insolvent under section 3, he may be proceeded against under the 9th section, without a previous demand.

Section 4 seems to supply the power of placing a debtor's estate in insolvency, where section 3 does not apply. One creditor may proceed under this 9th section, though several have joined in the demand, under section 4; and it would seem that a creditor proceeding under this 9th section might avail himself of a demand made by another creditor, under section 4, and might do so if the contingencies specified in section 7 had arisen, even if the debtor had, after demand, settled with the creditor making the demand (see *Dever v. Morris*, 1 Pugsley, 270).

"The Interpretation Act" (31 Vict. chap. 1, s. 7), thirty-firstly, enacts that where forms are prescribed, slight deviations therefrom, not affecting the substance or calculated to mislead, shall not vitiate them; and in Ontario, "The Administration of Justice Act of 1873," s. 49, provides that no proceeding at law or in equity shall be defeated by any formal objection.

But, in reference to the affidavit prescribed by this section, it is best to follow the forms given by the Act, and the affidavit should be entitled in the cause with the name of the plaintiff and defendant, although until the issuing of the writ there is no cause in court (*Sharp v. Matthews*, 5 U. C. P. R. 10).

The 20th section of the Act of 1869 required the affidavits of two credible persons showing the fact of insolvency, and also the affidavit of the creditor proving the indebtedness. It was held that this section was complied with, although the creditor or his agent deposing to the debt was also one of the two persons testifying to the facts and circumstances which were relied on as constituting insolvency (*Sharp v. Matthews*, 5 U. C. P. R. 10 ; 5 U. C. L. J. N. S. 97).

This section speaks of the "affidavit or affidavits filed" containing a reference to more than one affidavit. It cannot be necessary that more than one affidavit should be filed under this section, though in *Edgar & Chrysler's Ins. Act*, p. 54, it is stated that it will still be prudent to strengthen the case of the applying creditor by the affidavits of other witnesses.

Under section 4 an affidavit must be filed prior to making the demand. In proceeding for an attachment under this 9th section, when the contingencies specified in section 7 have arisen, it would still be necessary to file the affidavit, form B, under this section. Probably the reference to affidavits has in view such a case as this, where an affidavit would already be filed under section 4, and a second affidavit would be filed under this 9th section.

It would seem that under section 9, form B, of the Act the mere omission to describe the parties in the intituling of the affidavit, is not an objection, if they are sufficiently described in the body of the affidavit, and if it plainly appears that they are the same parties whose names are in the intituling. Where the body of the affidavit gives the name, residence, and description that is, in the opinion of the Court in (*McDonald v. Cleland*, 6 P. R. U. C. 289), plainly sufficient, though the intituling gives the name only. But where the name only of a defendant was mentioned in the intituling, and in the body of the affidavit he was described as a lumber manufacturer, but no where as to his residence throughout the affidavit, Mr. Justice Wilson expressed an opinion that this was clearly an irregularity (*McDonald v. Cleland*, 6 P. R. U. C. 289).

It is to be observed, however, that in this case the Court did not decide positively as to the omission of the residence and de-

scription of the parties in the intituling of the affidavit. As we have seen where a secured creditor applies for a writ of attachment under this section, he must show that the balance of his claim after deduction of the value of his security amounts to two hundred dollars. The creditor making the affidavit was secured in the case in which this decision was rendered. But the Court seemed to be of opinion that the same rule would apply to an unsecured creditor (*McDonald v. Cleland*, 6 P. R. U. C. 292). The form B does not contain any words showing that the creditor is unsecured, but it would seem advisable at all events to show this in proceedings under this section.

A demand was served under the fourteenth section of the Act of 1869 on the 31st day of January. On February the 6th (the 5th being a Sunday) an order was granted for, and an attachment issued. One of the affidavits filed in the application for the attachment was sworn on February the 4th. The Court held that the order for the issuing of the writ was not made too soon, and that it was immaterial that one of the affidavits was made within the five days allowed for petitioning under section 15 of the Act, or for making an assignment in accordance with the demand (*McInnes v. Brooks*, 1 U. C. L. J. N. S. 162; *Lawder Co. J.*).

The twelfth rule of practice in the Province of Quebec provides that whenever a particular number of days is prescribed for, the doing of an act in insolvency, the first and last days shall not be included, nor any fractions of a day allowed, and when the last day shall fall upon a Sunday or holiday the time shall be enlarged to the next juridical day.

The grounds of the decision are not given in the report of the foregoing case of *McInnes v. Brooks*, supra, and it seems clear that under the rule referred to it would not be an authority in the Province of Quebec. The writer doubts its authority in Ontario. It seems clear that the day of service of the demand would be excluded from the computation (see *Young v. Higgon*, 6 M. & W. 49), and the last day of the five would be included. Thus, if the demand were served on the first of the month, the petition should be presented not later than the sixth. If the offices are

closed on the last day, the rule seems to be to allow the doing of the act on the following day (*Mumford v. Hitchcock*, 32 L. J. C. P. 168; *Hughes v. Griffith*, 13 C. B. N. S. 324; *Connelly v. Bremner*, L. R. 1 C. P. 557; *Mayer v. Harding*, L. R. 2 Q. B. 410; *Hood v. Dodds*, 19 Grant, 639: see, however, *Moore v. Grand Trunk Railway Company*, 2 P. R. U. C. 227; *Cameron v. Cameron*, ib. 259).

This section assimilates the procedure for obtaining an attachment in all the Provinces. Section 3, s. s. 6 of the Act of 1864 required that a declaration should accompany the writ in the Province of Quebec; but this was irregular under the Act of 1869 (*MacIntosh v. Davis*, 14 L. C. J. 235), and of course is not required under the present Act.

Where a trader in Ontario became insolvent and an attachment in insolvency was issued to the sheriff of the county in which he resided, it was held under the Act of 1864, that the County Court Judge of such county had jurisdiction to issue another attachment to the sheriff of any county in Ontario, or any of the other Provinces of the Dominion in which the insolvent had property (re *Beard*, 15 Grant, 441).

This section of the present Act expressly authorizes the issue of concurrent writs, when required. Such writs will be required when the insolvent has property outside of the limits of the county or district for which the official assignee to whom the original writ is directed is appointed, for such assignee can only seize the property of the insolvent within the county for which he is appointed (see section 12).

It would seem that concurrent writs of attachment should not be issued merely for the purpose of effecting service on the insolvent, or upon several insolvents in the case of a firm. This is sometimes advantageously resorted to in Ontario in cases of ordinary writs of summons (see *Harrison's C. L. P. Act*, 25, and note *u*).

Although concurrent writs are subject to the rules of procedure of the court in ordinary suits as to their issue, and although "ordinary suits" would seem to refer to suits commenced by writs of summons and not to attachments under the Absconding Debtor's Act, or writs of *capias*, and although as we have seen concurrent

writs of summons in Ontario are issued merely to facilitate service, yet as concurrent writs of attachment may be executed without being served (see section 10), it would seem that they are only required to reach property which the insolvent may be possessed of outside of the county in which they issue. It would seem that in Ontario the concurrent writ may be had as of course at any time within six months from the issuing of the original writ (see Harrison's C. L. P. Act, section 20).

10. The service of a writ of attachment issued against a debtor under this Act, may be made upon him as provided for the service of an ordinary writ of summons in the Province where the service is to be made; and if such debtor remains without such Province, or conceals himself within such Province, or has no domicile in any Province of the Dominion, or absconds from his domicile, in every such case service shall be made by such notice or advertisement as the judge, or in the Province of Quebec, the judge or prothonotary, may order :

Concurrent writs of attachment issued against a debtor may be executed without being previously served upon him, except in cases where such debtor has his domicile or a place of business in the county or district in which the same is to be executed, when the writ may be served at such domicile or place of business.

In Ontario the service of an ordinary writ of summons must be personal, whenever practicable, but this section provides for substitutional service in the cases named therein.

A debtor who has made an assignment otherwise than under the Act cannot be served at his old place of business when he has really ceased to do business there and the business has been continued there merely by the assignee (*Hutchins v. Cohen*, 14 L. C. J. 113).

A judge in insolvency has power to rescind an order made by him for substitutional service of a writ of attachment (*Eaton v. Shannon*, 17 C. P. U. C. 592).

Great difficulties might, however, arise in setting aside an order for a writ of attachment after the appointment of an assignee, and the transfer of all the debtor's estate to him especially if the proceedings have gone any length, such as the declaration and payment of dividends, etc.

11. Writs of attachment shall be made returnable forthwith after the execution thereof: and immediately upon the receipt of a writ of attachment issued under this Act, the Official Assignee shall give notice of the issuing thereof by advertisement (Form D), to be inserted once in the Official *Gazette* and once in one local or the nearest published newspaper (40 Vict. s. 2).

It will be observed that this section makes the writ returnable forthwith after the execution thereof, whereas under section nine the defendant must be summoned to appear on a day mentioned in the writ: and the writ of attachment (Form C) specifies a day certain. The object would seem to be to make the writ returnable when served as in the case of ordinary writs of summons. Would a service of a writ of attachment after the day specified in the writ for its return be good?

The 29 Vict. chap. 18, s. 8, provided that writs of attachment might be made returnable in five days from the service thereof.

A writ of attachment issued on the 11th of March, was made returnable on the 22nd, a day certain instead of after the expiry of five days from the service thereof, and the writ was served more than five days before the 22nd. McQueen, Co. J., held that as the insolvents were not prejudiced by the irregularity, the attachment might be amended by the plaintiffs on the authority of (*re Owens*, 3 U. C. L. J. N. S. 22; *Gore Bank v. Eaton*, 3 U. C. L. J. N. S. 207; 3 L. C. *Gazette* 122).

A writ of attachment served after the day specified therein for the defendant's appearance would seem to be at least irregular. Possibly it might be amended so as to cure the defect.

The writ of attachment is not required to designate the parties by their names, residences, and descriptions, and the notice under this section does not so designate them, and though the affidavit for the writ is required to designate the parties in the intituling by their name, residence and description, but the assignee does not see this affidavit, and may therefore omit the residences and descriptions of the parties in this notice (see *McDonald v. Cleland*, 6 P. R. U. C. 292).

Would the non-insertion of this advertisement invalidate the proceedings of the assignee under the writ? In the United States it is held that the provision requiring notice of the ap-

pointment of an assignee is directory only, though the Statute uses imperative language.

"The Interpretation Act," (31 Vict. chap. 1, s. 6, ss. 3) provides that the word "shall" is to be construed as imperative, and the word "may" as permissive. *Nicholson v. Gunn* (35 Q. B. U. C. 7), has some bearing on the point, and would seem to show that the word "shall" in this section is imperative, and that the publication of the notice is necessary to the efficacy of proceedings under the attachment.

The advertisement of the issue of the writ of attachment is to prevent third parties from permitting or participating in any attempt to make away with the estate, and after such an advertisement the public is bound to know the incapacity of an insolvent to sell any of his property, and this incapacity continues, and the public is bound to know it during the pendency of an appeal from a judgment which quashes the attachment. A sale made by the insolvent of property, even when not seized under the attachment, in consequence of its being secreted, is absolutely null, and not annulable only (*Mallette v. Whyte*, 12 L. C. J. 229). In this case the attachment issued on the 23rd day of August, 1866. The insolvent contested the writ and it was quashed by judgment of the Superior Court on the 20th day of October, 1866. The guardian appealed from this judgment, and on the 5th of March, 1867, the judgment in appeal reversed the former judgment, and maintained the writ. The property in question was a horse, valued at two hundred and fifty dollars, and on the same 5th of March, 1867, the insolvent offered it for sale on the public street, and it was purchased by defendant for one hundred and twelve dollars. On the 9th of March, the guardian obtained an order, authorising him to institute conservatory process for the recovery of the horse, and caused proceedings to be taken. On the 20th of April he was appointed assignee, and on the 25th he intervened in the cause, and claimed the horse as part of the insolvent's effects at the issue of the writ of attachment, and, therefore, vested in him from that time. It was held that the defendant was bound by the advertisement of the issue of the writ, and that the assignee was entitled to recover the



horse without indemnifying the defendant for the sum he had paid.

12. The Official Assignee, by himself or by such deputy (which word shall in this Act include deputies) as he may appoint, shall, under such writ of attachment, seize and attach all the estate, property and effects of the Insolvent, within the limits of the county or district for which he is appointed, including his books of accounts, moneys, securities for moneys, and all his office or business papers, documents, and vouchers of every kind and description ; and shall return with the writ a report under oath stating in general terms his proceedings on such writ.

It will be observed that, under this section, the official assignee is only authorized to seize the estate, property and effects of the insolvent situate within the limits of the county or district for which he is appointed. If these effects are not within this county a concurrent writ must be issued to the assignee of the county in which they are situate, and if this county is not within the Dominion, the writ cannot be issued, and, as we shall see hereafter, the Act provides no means of reaching property out of Canada.

A mortgagee of goods and chattels under chattel mortgage requested an auctioneer to remove the goods and sell them, and the latter removed the same and was proceeding to sell them when they were seized under a writ of attachment in insolvency and claimed by the assignee, on the ground that the chattel mortgage was void. An order for an interpleader was granted on the application of the auctioneer (*Watson v. Henderson*, 6 P. R. U. C. 299).

Under the Statute 28 Vict. chap. 19, applicable to the Province of Ontario, if a claim is made to any property taken in execution under any process issued by or under the authority of any of the Superior Courts of Law, or any County Court, on behalf of any person not being the person against whom the execution issues, then on the application of the officer to whom the writ is directed, the Court may order an interpleader.

Where a sheriff had seized goods under an execution on the 31st of August, and on the 7th of September following, a writ of attachment in insolvency issued, and the guardian of the insolvent claimed the goods, it was held that an interpleader might be

ordered, notwithstanding objections that the attachment was subsequent to the execution, and that the guardian in insolvency had no title to the property (*Burns v. Steel*, 2 U. C. L. J. N. S. 189).

13. If the official assignee or his deputy is unable to obtain access to the interior of the house, shop, store, warehouse, or other premises, of the insolvent named in the writ, by reason of the same being locked, barred, or fastened, such official assignee or deputy is hereby authorized forcibly to open the same in the presence of at least one witness, and to attach the property found therein.

ASSIGNMENTS AND PROCEEDINGS THEREON.

14. A debtor on whom a demand is made by a creditor or creditors who has or have filed the affidavit required, may make an assignment of his estate to the official assignee appointed for the county or district wherein he has his domicile, or wherein he has his chief place of business, if he does not reside in the county or district wherein he carries on his business; and in case there is no official assignee in the county or district where he resides, or wherein he carries on his business, then to the official assignee for the nearest adjoining county or district, but such assignment may be set aside or annulled by the court or judge for want of, or for a substantial insufficiency in, the affidavit required by section four, on summary petition of any creditor to the amount of not less than one hundred dollars beyond the amount of any security which he holds—of which petition notice shall have been given to the debtor and to the creditor who made the demand of assignment within eight days from the publication of the notice thereof in the Official Gazette.

The 39 Vict. chap. 30, s. 3, provided that, "The 14th section of the said Act is hereby amended, by striking out the words 'or against whom a writ of attachment has issued as provided by this Act,' in the second, third, and fourth lines, and the words, 'or writ of attachment' in the twelfth line, and by striking out the words, 'or by section 9' in the fifteenth line, and the words, 'or who issued the writ of attachment,' in the nineteenth and twentieth lines."

The section is given above to read as amended by the 39 Vict. chap. 30, s. 3.

In *McDonald v. Cleland* (6 P. R. U. C. 292), Wilson, J., expressed an opinion in reference to section 14 of the Act of 1875, which applied also to the affidavit under section 9, form B., that a creditor could not take the objection that the affidavit was not pro-

perly entitled, showing the residence and description of the plaintiff and defendant as required by this form, but it being a statutory enactment the debtor might raise the objection (see *ex parte King*, L. R. 7 C. P. 94). This section as amended is limited to assignments after demand under section 4, and the latter section does not prescribe any form of affidavit, and, as we have already seen, entitling in a cause is not necessary in the affidavit required by section 4.

As this section was originally worded, it seemed to intend an assignment after writ of attachment issued against the debtor; but as the attachment itself vests the estate in the assignee, this provision was wholly unnecessary, and has therefore been expunged from the amended Act.

Under this section a creditor can move to set aside the assignment, though the right to set aside an attachment is, as we shall hereafter see, personal to the debtor, under the 18th section of the Act, and cannot be exercised by a creditor or by an assignee of the debtor.

The publication in the *Gazette* referred to in this section is the insertion of the notice (form G) under section 20, and the creditor must give notice of his application to set aside the assignment within eight days from the first publication of the notice in the *Gazette*.

A secured creditor could probably apply to set aside the assignment under this section and whether secured or unsecured it would seem necessary for the creditor to show that the insolvent was indebted to him in an amount not less than one hundred dollars beyond the amount of any security which he held (see *McDonald v. Cleland*, 6 P. R. U. C. 292). Would it be necessary that the creditor should also prove his claim in the ordinary way before applying under this section? Under section 2 (*h*) a creditor has no voice in any consent or action with regard to the management or disposal of the estate until his claim is proved. And there seems no obstacle to making proof by the creditor as soon as the notice (form G) is published.

This section, it will be observed, authorises a debtor to make an assignment after demand made upon him by a creditor. He

has no power of his own motion to make such assignment without demand, the present Act abolishing assignments which are purely voluntary. But in the event of the debtor not making an assignment under this clause, after demand made upon him, he is subject, as we have seen, to the issue of a writ of attachment under section 9 of the Act.

There are two modes of vesting the estate in the assignee, one by operation of law, as the issuing of a writ of attachment, the other by the insolvent's own act, as the execution of a deed of assignment after demand made upon him to do so. Where an assignment is made, the estate vests in the assignee from the time at which the deed is executed. If a writ of attachment is issued, the result will be the same, and the estate will vest in the assignee from the time at which it is actually issued (see *Whyte v. Treadwell*, 17 C. P. U. C. 492).

It was held in an unreported case before the late Judge Duggan, of the County of York, where a writ of attachment was issued, directed to one official assignee, and afterwards, on demand made against the debtor, he assigned to an assignee other than the one to whom the writ was directed, that the assignee under the writ of attachment was entitled to priority. A somewhat similar decision was rendered in *Thomas v. Martin* (17 L. C. J. 11, ante. p. 57). In this case it was held that when the attachment issued regularly, it prevailed over a voluntary assignment made on the same day.

In *Douglas v. Wright* (11 L. C. J. 310), it was held that a voluntary assignment must be made to an official assignee resident in the district in which the insolvent resides and carries on his business (s. c. 4 L. C. L. J. 12; see also *Hingston v. Campbell*, 11 L. C. J. 315; 2 U. C. L. J. N. S. 299; *White v. Cuthbertson*, 17 C. P. U. C. 377), and under this section the assignment must be to the official assignee appointed for the county or district wherein the insolvent has his domicile, or wherein he has his chief place of business, if he does not reside in the county or district wherein he carries on his business.

It was held in the Province of Quebec, that, under the 29 Vict. ch. 18, s. 2, taken in connection with the Act of 1864, an insolvent might validly make a voluntary assignment of his estate

and effects to any official assignee, whether resident within the district or county wherein such insolvent had his place of business or not (*Brown v. Douglas*, 13 L. C. J. 29; *ex parte Smith*, 12 L. C. J. 57).

Under the Insolvent Act of 1869, section 2, assignments in insolvency could be made only to an official assignee resident within the county where the insolvent had his domicile. Where an official assignee, resident within the City of Montreal, was, under the Act of 1864, appointed such "for the judicial district of Montreal," and continued in office under section 31 (last clause) of the Act of '69, the Court held that he had not, under the latter Act, the right to receive an assignment from an insolvent domiciled in a county being part of the district of Montreal, if there was an official assignee appointed under the Act for that county and resident therein (*Gravel and Stewart*, 17 L. C. J. 326).

If the assignment is not made to the proper assignee, it may, perhaps, be set aside by the judge in insolvency at the instance of any of the creditors who choose to complain of it; but it seems the creditors may by acquiescence and by acting under the assignment, render it valid. It would be a serious matter to set aside the whole proceedings under the Act, after lands had been sold by the assignee, debts collected and dividends paid (*McWhirter v. Learmouth*, 18 C. P. U. C. 136).

If the debtor's chief place of business is in one county or district and his domicile is in another, and proceedings are initiated in either county or district, and an assignment made to the official assignee of that county or district, it is a necessary consequence that the like proceedings cannot be had in the other, and the jurisdiction is exclusive in that court where the jurisdiction first attaches (see *re Hall*, 5 Law Rep. 269). In the case of an attachment the proceedings would be carried on where the debtor has his chief, or one of his principal places of business as the writ must be issued by the judge of, and directed to the assignee of, that county. The same rule would seem to apply to the case of concurrent writs, and in case of assignment under this section it is required to be to the assignee for the county wherein the insolvent has his domicile or chief place of business.

A petition calling in question the validity of an assignment under the Insolvent Act, of 1869, to an official assignee on the ground that the assignee was not resident within the county or place where the insolvent had his domicile, was held to require service upon the insolvent as well as upon the assignee (*Gravel and Stewart*, 17 L. C. J. 23).

The Act of 1869 required the deed of assignment to be in duplicate and, where the insolvent possessed real estate, the assignment was also required to be registered in the county in which such real estate was situate. It was held that to make the deed effectual to pass the title to real estate under this Act, it should have been executed in duplicate and registered, and this not having been done the title remained in the debtor executing it (*Parlee v. Agricultural Insurance Company*, 3 Pugsley, 476). The deed of assignment in this case was in the form prescribed, but, in addition to not being executed in duplicate or registered, it did not appear that any meeting of creditors had been called under the Statute, or that anything had been done under the assignment, and it was held that it did not even estop the debtor executing it. From this case we may deduce the conclusion that the assignment to be effectual must be in the form prescribed by the Statute, and must be executed and registered as therein required. From the cases already cited, it may be seen that the assignment being in a special statutory form and not being couched in terms sufficient to pass all descriptions of property at common law, and deriving its efficacy solely from the Statute, that the form must be followed to give it effect under the Statute. The present Statute does not expressly require its execution in duplicate. As a certified copy may be registered under the 19th section, this would not be absolutely necessary, though convenient in most cases.

It was held by Sherwood, Co. J., that under the 7th section of the Act of 1869, the deed of assignment was required to be in duplicate, and when not in duplicate, that it did not comply with the Statute which was mandatory. Where the assignment was in one part only, and the insolvent had not kept any books of account, his discharge was refused (re *Sullivan*, 5 U. C. L. J. N. S. 71; *Sherwood*, Co. J.).

It was held, under section 2 of the Act of 1864, that a voluntary assignment was not valid, unless accepted by the assignee. In the case in which this objection was held good, the assignee had not executed the assignment or in any way acted under the provisions thereof, nor was the assignment deposited or filed in the office of the proper court in that behalf, or registered in the registry office of the county (*Yarrington v. Lyon*, 12 Grant, 308).

This decision was followed in a case where the assignee refused absolutely to be an assignee of the insolvent's estate and to accept the assignment, and nothing whatever was done under the assignment, and the estate still continued in the possession of the insolvent himself, and it was held that a discharge issued by a judge, however inadvertently, would not relieve the insolvent from his debts (*Becher v. Blackburn*, 23 C. P. U. C. 207).

The cases of *Yarrington v. Lyon* and *Becher v. Blackburn*, before referred to, were both decided on the Act of 1864. Section 2, s.s. 4 of that Act contained words indicating that consent was necessary when the assignment was to a creditor as it might be under that Act. In *Brown v. Wright*, 35 Q. B. U. C. 378, on the Act of 1869, Morrison, J., in delivering judgment, says: "I find nothing in the Act requiring any assent to or execution by the official assignee of the voluntary assignment to give it operation. The insolvents were enabled by the Statute to make the voluntary assignment to the official assignee, and it becomes the duty of the official assignee named therein to act upon it, in whom all the property of the insolvents is vested for the benefit of all the creditors, and for effecting the object of the Act;" and the assignment having been executed *bona fide*, and the assignee having acted on it in about a month after, it was held to have taken effect on the day it was made.

It is doubtful whether the old rule as to acceptance by the assignee being necessary would obtain under the present Act, at all events, in the case of an attachment. The official assignee is made an officer of the Court. The estate, while in his possession, is in the custody of the law in the same manner as if he were a sheriff (*Barclay v. Sutton*, 7 P. R. U. C. 14), and it seems the duty of the official assignee to accept the estate.

Where an assignment is executed in good faith, the assets of the insolvent pass to the assignee thereunder, although he does not act upon it for some time after. A Division Court bailiff received an execution against R. on the 12th of May, 1873, on a judgment recovered on that day, on which, on the 14th, he seized two horses. On the 10th, R. executed a voluntary assignment under the Insolvent Act, but the assignee on being made acquainted with it advised a private settlement, and did not receive and act on the assignment until the 7th June. The bailiff, who had left the horses in R's. possession, taking a bond for their forthcoming, took them again and advertised them for sale on the 2nd of June; but, on being notified by the official assignee he delivered them over to the assignee on the 9th; and, in an action against the bailiff for neglect in levying, it was held that the horses passed to the assignee on the execution of the assignment, though he did not claim anything under it until the 9th of June (*Brown v. Wright*, 35 C. B. U. C. 378).

The mere fact that certain creditors have notice of an assignment does not make the deed irrevocable (*Spooner v. Jones*, 3 Ch. Chamb. 481).

An assignment by a person with no assets for the assignment to take effect upon and for the purpose of defeating a creditor, who is at the time suing such person, is fraudulent, and a discharge in such insolvency proceedings is void and does not prevent the debtor's arrest on a *Ca. Sa.* (*Thomas v. Hall*, 6 P. R. U. C. 172).

This case is based upon the ground that the evidence showed it to be a mere fraudulent device contrived for the express purpose of defeating the plaintiff's recovery by a fraudulent abuse of the provisions of the Act. The plaintiff in the action was the only creditor, and the assignment seems to have been made with a view of defeating his action. The Court uses language to indicate that re *Brett* (unreported) and re *Thomas* (15 Grant, 196), may be no longer binding authorities, the latter case being a decision on the Act of 1864, which applied to non-traders as well as traders. However, in *Parke v. Day* (24 C. P. U. C. 619), the same learned judge



who delivered the judgment in *Thomas v. Hall* explains that the judgment does not profess to decide that an assignment in insolvency executed by a person having at the time of its being executed no property, is for that reason void. Assets might be acquired before the insolvent applies for a discharge. But if there were no assets at the time of assignment, or at the time of application for the discharge, the learned judge was of opinion this would be the strongest proof that it was not made *bona fide*, but was made in fraud of the Act. The cases of *re Thomas* and *re Brett* are disapproved of but not overruled.

Where several persons are in partnership, an assignment by one of them, in his own name, will pass his interest in the partnership property, and also his own individual property, but it will not constitute the other partners insolvent, or transfer their share or interest in the partnership property to the assignee. But it will dissolve the partnership (see section 40). In the case of a partnership, where there are several members residing in different counties, an assignment must be made in the names of all the partners in the county where the chief office or place of business of the partnership is; in other words the domicile of the partners. Where this is done the entire partnership effects as well as the interest therein of each partner will pass (*re McKenzie*, 31 Q. B. U. C. 1).

This decision was under the Act of 1869. Section 2 of this Act did not give the option of assigning to an official assignee for the county or district wherein the debtor had his chief place of business. It required the assignment to be to the official assignee, resident within the county or district wherein the insolvent had his domicile, and section 143 of the Act declared that the chief office or place of business of the partnership should be their domicile or place of business for the purposes of the Act.

An assignment made by a co-partnership vests in the assignee the separate estate of each partner, as well as the co-partnership estate, and a subsequent assignment by one of the partners individually can have no effect (*re Macfarlane*, 12 L. C. J. 239).

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When an assignment is made by the members of a partnership, it will pass their separate property, as well as the property of the firm, though an intention is shewn to limit the operation of the assignment to the property of the firm, by inserting after the general description of property, in the statutory form of assignment, the words "of and belonging to the said co-partnership" (re *McLaren and Chalmers*, 1 Appeal Reports, Ont. 68).

One of two partners, a few days before a writ of attachment against both, under the Insolvent Act of 1864, had issued, assigned all his separate estate to the defendant for the general benefit of the creditors of the assignor, "*pari passu*, and without any preference or priority, according to the provisions of the Insolvent Act of 1864." The defendant was not the official assignee in insolvency, and it was held that the plaintiff, as official assignee under the Act, and joint assignee of the estate of the two partners, was entitled to claim the individual property of one of them (*Wilson v. Stevenson*, 12 Grant, 239).

It would seem that, on the appointment of an assignee to a partnership firm, the separate estate of each of the partners, as well as their joint estate, vests in him. The separate creditors of one of the partners, therefore, though they may afterwards resolve to accept a composition in satisfaction of their separate debts, cannot vest the separate estate in any other trustee. But it is the duty of the assignee appointed by the joint creditors, to administer the separate estate in accordance with the resolutions of the separate creditors, and then to carry over the surplus to the joint estate (ex parte *Philps*, L. R. 19 Eq. 256).

Persons may be jointly adjudicated bankrupt, who are not, strictly speaking, partners, provided they are jointly indebted in a sufficient amount, and the property, if any, in which they are jointly interested for the purpose of a joint adventure, in respect of which the joint debts were contracted, will be for all purposes joint estate (re *Leggatt*, L. R. 8 Ch. 965); where there is a joint adjudication, the whole of the property of the bankrupts, whether partnership or separate property, vests in the trustee and is administered by him (re *Moore*, L. R. 19 Eq. 256).

Two partners carried on business in England and Ireland. One

of the partners executed an assignment in England for the benefit of his creditors, and was afterwards adjudicated a bankrupt in England. Some of the joint estate of the partners came into the hands of the trustees of the deed, who sold it, and the proceeds of the sale were, under the order of the Court, deposited in a bank in the joint names of the trustees of the deed and the trustee in the bankruptcy. Before this was done, a joint adjudication of bankruptcy had been made against the two partners in Ireland. On an application by the Irish assignees of the joint estate, to have the proceeds of sale paid over to them, it was held that the trustee under the separate adjudication in England, and the assignees under the joint adjudication in Ireland, were tenants in common of the joint assets; and that the latter had no better title to the proceeds of the sale in question than the former, and the adjudication was refused on that ground, and also on the ground of convenience, as the greater number of the joint creditors lived in England, and wished the fund in question to remain in this country (*ex parte James*, 29 L. T. N. S. 761; L. R. 9 Ch. App. 74).

V. and J. D. being in partnership, J. D. went out, and his father, D. D., took his place in the firm. About six months after this, V. assigned to D. D. all the stock in trade, but the possession was not changed nor the assignment filed. The plaintiffs subsequently became assignees of the firm under the Insolvent Act of 1864, and of each of the partners. In an interpleader issue to try their right as against an execution creditor of V. alone, the execution being after the assignment to D. D., but whether before or after plaintiffs' title accrued did not appear, the Court held that they must succeed; that they were clearly entitled to the goods themselves, for defendant, as creditor of one partner, could not seize them out of the possession of the assignees of the firm, although he might have a right to V.'s share of the proceeds, if any, after paying the partnership debts (*Wilson v. Vogt*, 24 Q. B. U. C. 635).

A partner of a mercantile firm has no power, either during the existence or after the dissolution of a partnership, to make an assignment of the property and effects of the firm to a trustee for the benefit of creditors (*Stevenson v. Brown*, 9 L. J. U. C. 110).

15. The assignment mentioned in the next preceding section may be in the form E; and in the Province of Quebec the deed of assignment may be received by a notary in the authentic form.

The Acts of 1864 and 1869 required that a copy of the list of creditors produced at the first meeting should be appended to the deed of assignment (see *King v. Smith*, 19 C. P. U. C. 319). This would seem to be unnecessary under the present Act.

It was held under the Act of 1865, that where the assignment was made to an official assignee, a copy of the list of creditors produced at the first meeting of creditors need not be appended, for in fact no such meeting is held (*Hingston v. Campbell*, 11 L. C. J. 315 ; 2 U. C. L. J. N. S. 299).

Under section 2 (g) the assignment in the Province of Quebec must be before a notary, and, in that Province, the acceptance of an assignment must be made by the official assignee, and cannot be made by attorney (*Hervey v. Rimmer*, 14 L. C. J. 24).

16. Whenever an insolvent shall have made an assignment, and in case no assignment shall have been made, but a writ or concurrent writs of attachment shall have issued as provided for by this Act, such assignment or such writ or writs of attachment, as the case may be, shall vest in the Official Assignee of the county or district wherein the same shall have issued, all right, power, title and interest which the insolvent has in and to any real or personal property, including his books of account, all vouchers, letters, accounts, titles to property and other papers and documents relating to his business and estate, all moneys and negotiable papers, stocks, bonds and other securities, and generally all assets of any kind or description whatsoever which he may be possessed of or entitled to up to the time of his obtaining a discharge from his liabilities, under the same charges and obligations as he was liable to with regard to the same ; and the Assignee shall hold the same in trust for the benefit of the insolvent and his creditors, and subject to the orders of the court or judge ; and he may upon such order and before any meeting of the creditors, institute any conservatory process or any proceeding that may be necessary for the protection of the estate ; he may also upon such order, sell and dispose of any part of the estate and effects of the Insolvent which may be of a perishable nature : such assignment or writ or writs of attachment shall not, however, vest in the Assignee such real and personal property as are exempt from seizure and sale under execution, by virtue of the several Statutes in that case made and provided in the several Provinces of the Dominion respectively, nor the property which the insolvent may hold as trustee for others.

As a general rule, all powers and authorities relating to his property granted by the insolvent before his insolvency, which are revocable, will be revoked by his insolvency, as against his trustee (ex-parte *Snowball*, L. R. 7 Ch. App. 534). But if, after the act of bankruptcy, and before the adjudication, property is conveyed under such a power to a *bona fide* purchaser, who has no notice of the act of bankruptcy, the purchaser may hold the property as against the trustee (ib.).

Section 40 of the Act of 1869 provided that all powers vested in any insolvent, which he might legally execute for his own benefit, should vest in and be executed by the assignee. There is no analogous provision in the present Act, but probably this section will be held sufficient to pass such powers (see also section 38).

The words "which he may be possessed of" up to the time of obtaining his discharge, &c., are inserted in this Act for the first time. Under the reputed ownership clause in the English Act, the registration of a bill of sale has no operation whatever if the vendor or mortgagor be allowed, although by the terms of the deed, to remain in possession, he is in such case in possession as apparent or reputed owner with the consent of the other (*Stansfield v. Cubitt*, 2 De. G. & J. 222; *Ashton v. Blackshaw*, L. R. 9 Eq. 510; ex parte *Homan*, L. R. 12, Eq. 598). This clause of our Act does not, it would seem, introduce the English law as to reputed ownership. The latter law is aimed at property in the possession of the bankrupt at the commencement of the bankruptcy. These words in our Act seem directed to property in the possession of the insolvent after assignment, and before discharge, and the registration of a bill of sale would be unaffected by anything contained in this section, on the mere ground of the vendor remaining in possession. Under the Act of 1869, the assignee took what was the property of the insolvent, that is such property as he had a legal and equitable title to; or, what was in effect, in many cases, the same, he took the debtor's property subject to all legal and equitable claims upon it. A bill of sale filed or not filed was a legal charge upon the property and goods as against the insolvent, and good therefore as against his assignee, who took no more than the insolvent himself had a title to. So also an equitable mortgage

or an equitable assignment of a debt or other appropriation of his estate good against the insolvent would be good also against his assignee in insolvency (re *Coleman*, 36 Q. B. U. C. 583; per Wilson, J.).

Property in the possession of an insolvent, for the purpose of being sold on commission, will not pass to the assignee, as the order and disposition clause of the English Act is not in force here. In the case of *Coleman* above referred to, it was held that parties holding warehouse receipts for coal, in the possession of the insolvent, were entitled to the coal as against the assignee, though the receipts were not strictly regular under the Statute, the parties having at least an equitable if not a legal charge upon the coal specified in the receipts (ib. 559).

If goods are sent to a factor or agent to be disposed of, and he becomes insolvent, and the goods remain distinguishable from the general mass of his property, the principal or owner may recover the goods in specie, and is not driven to the necessity of proving his debt in insolvency. The law is the same, even if the goods are sold and reduced to money, provided that the money received be distinguishable from the factor's other property. The plaintiff purchased barley from R., telling him to consign it to C., and draw on C. for the purchase money. C. was to keep the barley as plaintiff's agent until the plaintiff directed him to sell, the plaintiff paying him such a sum as he might require, by way of margin, to protect himself against a fall in price. C., to reimburse his advance on R.'s draft, obtained a discount from the bank on his own note, secured by the warehouse receipt for the barley, which he transferred to the bank. While C. held the barley, the plaintiff paid to him \$540 as margin, to hold or "carry" it for him notwithstanding decline in price. The barley was shipped by plaintiff's instructions to Oswego, to the order of the bank, where it was sold, and the bank received the proceeds on the 2nd of December, having previously had notice that the plaintiff owned the barley. The money never came into the hands of the insolvent, but remained with the bank until ordered to be paid into court. About the 17th November, C. left the country, and an attachment in insolvency having issued against him, an interpleader was directed to try

whether the balance of such proceeds above the bank's advances belonged to his assignee or to the plaintiff. While C. held the barley, it was spoken of, and dealt with, by him as the plaintiff's. The Court held that the plaintiff was entitled to it, for the barley was his, and the money, the proceeds of its sale, never came into C.'s hands, or was mixed with his general assets, and could therefore be easily distinguished. C. had advanced, by paying R.'s draft, more than the proceeds of the barley, and it was contended, therefore, that there was no surplus available for the plaintiff, but the court held that the plaintiff was entitled to deduct from such advance the sums paid by way of margin.

After C. had absconded, the plaintiff went to his office to ask about his barley, and there saw R., the manager of C.'s business, who went with him to the bank, and had a conversation with the cashier; and it was held, that their evidence of what passed was clearly admissible (*Cotter v. Mason*, 30 Q. B. U. C. 181).

It would seem, under the latter part of this section, that goods deposited with a firm, to be sold on commission, are property held for the benefit of another, and do not vest in the assignee. Such goods cannot be detained from the owner by the assignee, though they were seized by the landlord on the premises of the insolvent, prior to the attachment of the estate under the Act, and he has filed a claim with the assignee, asserting his lien upon them for unpaid rent (*Lawlor v. Walker*, 17 L. C. R. 349).

The Statute in force in the United States provides that no property held by the bankrupt in trust shall pass by the assignment. There it is held that the trustee, meant by this clause, can only be a mere naked trustee, who holds the legal title, but has no beneficial interest in the subject of the trust. A vendor is not such a trustee for the vendee, if all the purchase money has not been paid (*Swepton v. Rouse*, 65 N. C. 34).

The Statute applies to all estates where the trust can be legally established, and is effectual against one claiming under the assignee, who is not in the position of a purchaser without notice. Information of a fact coming from a source which ought to be heeded is sufficient notice (*Faxon v. Folvey*, 110 Mass. 392).

Land held by the bankrupt, under an agreement to reconvey upon the payment of a certain note, is held in trust and does not pass to the assignee (ib.). The trust property must be property that can be followed or distinguished. There must be some earmark by which it can be recognised—as for instance, where goods are sent to a factor to be disposed of, and the factor becomes insolvent, and the goods yet in his possession can be distinguished from the general mass of his property, the principal may recover them in *specie*, and is not obliged to prove his debt in the insolvency proceedings. Even where the insolvent has sold the goods, if he has kept the money received from the sale in separate bags, the principal has been permitted to claim and hold the money against the assignee. Where, however, the trust property does not remain in *specie*, but has been made away with by the trustee, the *cestius que trustent* have no longer any specific remedy against any part of his estate on his insolvency; but they must come in *pari passu* with the other creditors, and prove against the trustee's estate for the amount due them (re *Janeway*, 4 B. R. 100; *Wood v. Brooke*, 9 B. R. 395).

It is not essential to the effective assertion of a beneficial title to a trust fund that the fund shall be susceptible of separate identification. No more is required than proof of substantial identity. Money has no earmarks by means of which it can be specifically identified. Into whatever form it may be changed, if it can be clearly traced, equity will rescue it from a wrongful appropriation, and give effect to the right of its real owner (*Voight v. Lewis*, 33 Leg. Int. 404).

If the insolvent deposits the trust funds in a bank with his own in his own name, the mode of ascertaining how much belongs to the trust estate is to take the deposits and withdrawals in the order of their dates, find out how much of the balance belongs to the trust and how much to the general fund, and divide accordingly (re *Hapgood*, 14 B. R. 335).

Goods and chattels, which are in the possession of the insolvent for a specific purpose, will not, as a general rule, pass to his assignee. Such property is in fact clothed with a species of trust, and subject to the same principles as trust property (ex parte



*Waring*, 2 G. & J. 404; *Steele v. Stuart*, L. R. 2 Eq. 84; *ex parte Angerstein*, L. R. 9 Ch. App. 479).

Where accommodation bills were drawn by a merchant abroad upon merchants in England, and the latter compounded with their creditors, it was held that bills remitted to them by the drawer to meet the accommodation bills, and remaining in their hands, belonged to the drawer, subject to his indemnifying them in respect of the compensation paid by them to the holders of their acceptances (*ex parte Gomez*, L. R. 10 Ch. App. 639; see also *Yglesias*, L. R. 10 Ch. App. 635; *ex parte Lambton*, L. R. 10 Ch. App. 405).

Bills of exchange were drawn by the vendor and shipper of goods upon the purchaser, for the invoice prices of the goods, with a direction to place the same to the account of the shipments. On the acceptance of the bills by the purchaser, the bills of lading were handed over to him. The bills of exchange were dishonoured at maturity, and the purchaser became insolvent. It was held that there was no specific appropriation of the proceeds of sale of the goods to meet the bills of exchange (*re Entwistle*, L. R. 3 Ch. D. 477).

A. and H., a firm doing business in Hamilton, had a draft for \$1,200 accepted by B. at Montreal, for their accommodation, falling due on the 27th of April. H., in order to obtain funds to meet it, on the 26th of April, procured a draft on B. for \$600, to be discounted by the plaintiffs, telling them that it would be accepted, and the proceeds of it were placed to the general credit of the firm. This draft was sent to B. for acceptance, and H. on the same day wrote to him, enclosing the firm's cheque for \$1,200 on the Bank of Montreal, to take up the \$1,200 draft and requesting him to accept that for \$600. On the 27th, B. duly paid the draft for \$1,200. On the 28th, A. and H. had a difference, and A. hearing from H. that the firm were in difficulties, and that he intended using their funds in paying B. and another person, A. thereupon, on the 29th, drew out on the cheque of the firm their balance in plaintiffs' bank, consisting of the proceeds of the draft for \$600, of which A. knew nothing, and of other moneys, and handed it to their solicitor, for the benefit of the creditors generally. Between the 25th and 29th, both the debtor and creditor side of the firm's

account had been dealt with, and the balance increased in their favour. H., on the 29th, on hearing what A. had done, wrote to B. that, in consequence, the cheque sent him could not be paid, and B then refused to accept the draft. On the 2nd of May, the firm became insolvent, and an assignee was appointed to whom the solicitor handed over the moneys deposited with him. The plaintiffs, however, claimed the amount of the \$600 draft, contending that it was only discounted on the faith of its being accepted, and that as one of the partners had caused its non-acceptance by his letter to the drawee, there was a failure of consideration, and that they were therefore entitled to follow the money in the assignee's hands; but the Court held that they were not so entitled, and that the case was the ordinary one of the discount of a draft, on the belief that it would be accepted, and that the money formed part of the firm's general assets and passed to the assignee (*Can. Bank Com. v. Davidson*, 25 C. P. U. C. 537).

Defendant purchased goods from L., who said he would draw on defendant through the Merchants' Bank, and L. accordingly did so, but the draft was never accepted by the defendant. The manager of the bank swore that he discounted the bill for L. on the faith of his representation that defendant owed him the money, and would call and accept it; but there was nothing to show that the discount was made on the faith that it would be repaid out of the specific debt which defendant owed to L. It was held that this was not sufficient to constitute an equitable assignment of the debt by L. to the bank; and that the payment of the draft by the defendant to the bank after L.'s insolvency, was therefore no defence against a purchaser of L.'s estate from the official assignee, on the purchaser afterwards suing for the price of the goods (*Lamb v. Sutherland*, 37 Q. B. U. C. 143). The Court expressed an opinion that if L., at the time of the discount, had said to the bank, "I want to draw on defendant for so much money, as he owes me, and I will guarantee that he pays you that debt;" or "I will pledge that debt to you," that this would have been a good equitable assignment of the debt (ib.).

The mere fact that a merchant has drawn upon the bankrupt for the price of goods will not give him a right to insist on the

appropriation of the goods, to the payment of the price even though the goods remain in specie in the hands of the bankrupt at the time of the bankruptcy; nor does a trustee in bankruptcy, by receiving goods sold on credit after the bankruptcy, create any trust in favour of the vendor or consignor (re *Shackelton* L. R. 10 Ch. 446).

If an account is, in plain terms, headed in such a way that a banker cannot fail to know it is a trust account, the moneys standing to that account, if a failure of the person keeping it occurs, will belong to the trust; and when a customer has opened with his bankers separate accounts, specially headed with the names of the trusts to which the moneys paid into those accounts belong, the bankers are not at liberty upon the bankruptcy of the customer, to apply those moneys in payment of the balance due to them upon the customer's overdrawn private account (ex parte *Kingston*, 25 L. T. N. S. 250; L. R. 6 Ch. 632).

If the assignee allows the insolvent, before his discharge, to trade and contract debts, and he assigns the property acquired by him in such trading to secure a debt so contracted, and the creditor has not notice of the insolvency, the title of the latter will prevail against that of the assignee, if the latter had notice of the trading, and acquiesced in it (*Engelbach v. Nixon*. L. R. 10 C. P. 645; ex parte *Bird*, L. R. 1 Ch. 521).

The assignee is entitled to any beneficial contract of the insolvent. It would seem that the party damnified by breach of such contract could not bring an action against the insolvent, but must prove against his estate. When the assignee did not disclaim a contract under the 23rd and 24th sections of the English Act of 1869, but carried it on for a time for the benefit of the estate, it was held that he was still at liberty, on finding it unprofitable, to cease to perform it, and in that case the other party to the contract was held entitled, under section 31 of the Act, to prove against the estate for the damages occasioned by the breach of contract, that this was his only remedy, and that the assignee was not liable personally or on behalf of the estate (re *Sneezum*, L. R. 3 Ch. D. 463).

In order to justify a vendor in refusing to complete a contract

for the sale and delivery of goods, on the ground of the insolvency of the purchaser, there must either be actual insolvency on the part of the purchaser, or such proof or admission of the insolvency of the purchaser at the time, as amounts to a declaration of intention not to pay for the goods (re *Phoenix B. S. Co.*, L. R. 4 Ch. D. 108; see this case, as to what is sufficient declaration of insolvency; see also ex parte *Chalmers*, L. R. 8 Ch. 289-293).

The mere insolvency of the vendee does not of itself authorize the vendor to rescind an executory contract for the sale of goods. In March 1872, the plaintiff, a merchant at Orillia, gave to D. the travelling agent of defendants, who were merchants at Montreal, an order for certain goods, amongst which were 500 kegs of nails, at \$3.80 per ton which D. accepted,—the goods to be delivered monthly during the season, or sooner if required, by the plaintiff, at six months' credit. In May following, after all the goods, except the nails, had been delivered, the plaintiff was burned out, in consequence of which he became insolvent, and so notified his creditors, giving them a statement of his assets and liabilities, and offering them a composition of sixty cents in the dollar, which they accepted, and a deed of composition and discharge was executed, the composition being payable by instalments at certain stated periods, the plaintiff to give his creditors his promissory notes for the said instalments, and to assign to a trustee certain policies of insurance and other securities for the due payment of the instalments, but on the payment of the instalments at the times specified, the creditors were to release the plaintiff from all their claims.

Neither at the meeting of plaintiff's creditors, nor at the time the deed was executed, was any mention made of the plaintiff's intention to require the performance of the contract as to the nails, nor did he include it as one of his assets, either in his statement delivered to his creditors or in the schedule attached to the deed. There was contradictory evidence as to a rescission of the contract in fact, but the jury found there had been none. The plaintiff having subsequently sued defendants for non-delivery of the nails, it was held by the Court and affirmed on appeal, Draper, C. J. of Appeal, dissenting, that the evidence showed a rescission

in law of the contract, the conduct of the plaintiff having been such as to justify the defendants in the belief that he intended to abandon it upon his insolvency, and there being evidence that the defendants in such belief likewise abandoned it (*Bingham v. Mulholland*, 25 C. P. U. C. 210).

Where a party, who becomes insolvent, has a contract for the delivery from time to time of certain goods, the insolvency will destroy the vendor's obligation to make delivery until he is paid for the whole of the goods delivered and to be delivered, although he may have agreed to give credit for the goods. But the mere fact of the insolvency of the purchaser does not put an end to the contract. If the purchaser can still comply with the contract on his part, and gives notice thereof to the seller, the latter would be bound to complete the contract, and it seems to be the duty of a purchaser having beneficial contracts to inform his creditors if he becomes insolvent, that they may be in a position to take advantage of them (ex parte *Chalmers*, 28 L. T. N. S. 325 ; L. R. 8 Ch. 289).

By the 23rd and 31st sections of the English Act, it is quite clear that where there is in existence, at the date of the insolvency, a contract between the insolvent and any other person, the assignee of the insolvent has the option either to accept or repudiate it ; but whether he accepts or repudiates it, the insolvent is thenceforth discharged from liability. If the assignee repudiates the contract, the section provides that the person injured by the assignee's repudiation shall be deemed a creditor to the extent of the injury and may prove the same as a debt under the insolvency (see ex parte *Waters*, 28 L. T. N. S. 757 ; L. R. 8 Ch. App. 562).

But there seems to be an exception to this rule in the case of contracts involving the personal skill of the insolvent, such contracts the assignee cannot insist on performing vicariously for the bankrupt, since he cannot sue the party refusing to pay for the work, because the work, not being done by the insolvent personally, is not the work contracted for (*Knight v. Burgess*, 33 L. J. Ch. 727).

An opinion is, however, expressed in Robson (3rd Ed. 366), that under the 19th section of the English Act of 1869, which requires the bankrupt to aid to the utmost of his power in the realization

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of his property, and the distribution of it amongst his creditors, the trustee will be entitled to require the bankrupt to give his aid in completing any contract unexecuted at the time of his bankruptcy (see section 25 of our Act).

The assignee has an election to repudiate a contract, if it may more properly be regarded as a burden than a privilege, as for instance, where, from the conditions of the contract, he can derive no benefit for the creditors and may subject the estate to loss if he assumes the contract (*Streeter v. Sumner*, 31 N. H. 542; *Rugley v. Robinson*, 19 Ala. 404).

The assignee is not, at least, ordinarily bound to take into his possession property which will be a burden instead of a benefit to the estate. If he elects not to take, the property remains in the insolvent, and no one has a right to dispute his possession. His possessory title is good against all the world but his assignee (*Smith v. Gordon*, 2 N. Y. Leg. Obs. 325).

But some period must be limited within which the election is to be made, for he cannot be allowed to hold the title in abeyance for an indefinite period. If with the knowledge of the insolvent's title, or with means of knowledge, he stands by for a length of time without asserting his claim and allows a third person to acquire an interest in the property, it is too late to assert his claim and the time for election is past (*Smith v. Gordon*, 2 N. Y. Leg. Obs. 325).

The interest and rights of the insolvent, under contracts, are transferred to the assignee. Whatever the rights are, the assignee can claim and enforce. It is not the purpose of the insolvent law to interfere with or avoid contracts made by the insolvent with other parties, or to prevent their execution (*Foster v. Hockley*, 2 B. R. 406).

An agreement that the title to property sold to the insolvent should not vest in him, until all the purchase money has been paid, binds the assignee, even if the insolvent has paid all but a small portion of the purchase money. The ownership remains in the vendor until the final payment. Creditors cannot enforce their claims without paying to the vendor the remaining portion (re *Sym*, 7 B. R. 182).

The assignee takes the property of the insolvent, subject to all legal and equitable claims of others. He is affected by all the equities which can be urged against the insolvent (*Cork v. Tullis*, 9 B. R. 433).

The insolvent is personally released by a discharge; but the property and rights of property vested in the assignee are subject to the creditors, and are held in trust for them, in whatsoever hands these may be found (*Clark v. Clark*, 17 How, 315).

The Statute does not create any estate of inheritance in the assignee himself, although he may, by his official action, convey lands. Whatever rights vest in him are official, and not personal, and are not heritable or corporate (*Steevens v. Earles*, 25 Mich. 40).

Assignees in bankruptcy do not like heirs, and executors, take the whole legal title in the bankrupt's property. They take such estate only as the bankrupt had a beneficial, as well as legal, interest in, and which is to be applied for the payment of his debts (*Rhoady v. Blackiston*, 106 Mass. 334).

As soon as a will of real or personal estate is admitted to probate, the title of the legatee or devisee takes effect, by relation from the death of the testator. If the devisee or legatee is declared insolvent, in proceedings commenced after such death, and before the probate of the will, the legacy or devise will pass to his assignee, if he has never renounced or disclaimed the legacy or devise. After the commencement of the proceedings in insolvency, he has no right to disclaim or renounce it (re *Fuller*, 2 Story. 327); a devise of property to a trustee to pay the income thereof to a third person, free from liability for his debts, is not such an interest as will pass to the latter's assignee (*Nichols v. Eaton*, 13 B. R. 421). The growing crop passes to the assignee, and should be placed upon the schedules as personal property (re *Schumpert*, 8 B. R. 415).

A debtor has no right to reserve from his estate a sum of money sufficient to meet the expenses of procuring his discharge (re *Thompson*, 13 B. R. 300).

Not only does the assignee take all the property that the insolvent was entitled to at the time of the assignment, but in some cases he takes property that the insolvent could not assert a claim

to. Thus, if the insolvent has made a fraudulent conveyance of property, this would be good against the insolvent, but the assignee is, nevertheless, entitled to claim it, and the assignment vests the property in the assignee, although it is not shown in the insolvent's statement of property and assets (*Halbrook v. Coney*, 25 Ill. 543). The title to real estate situate in a foreign country does not vest in the assignee, for a statutory conveyance can have no extra territorial effect upon real estate (*Oakey v. Bennett*, 11 How, 33; see also *Robson*, 3rd Ed. 419-420). No doubt, under the power to issue concurrent writs of attachment, the real or personal estate in any part of Canada might be made to pass, but it is doubtful whether the assignment would operate even as to personalty outside of the Dominion. In *Roe v. Smith* (15 Grant 344), the Court seemed to be of opinion that money with which the insolvent had absconded could not be recovered from him in the United States. In this case the defendant had left for the United States with a considerable sum of money; he was pursued there by one of his creditors, and by threats made to hand over \$880. A suit was instituted by the assignee in insolvency against the creditor to recover this sum, on the ground that its payment to the creditor gave him an unjust preference over the other creditors. The Court declared: "The money which was handed over to the defendant was not within the reach of our laws; it would not have formed any part of the insolvent's estate for distribution. It had been withdrawn from the estate, and was beyond the reach of any assignee of it, and could not have benefited the creditors." But the personal estate out of England of a bankrupt in England will vest in his trustee, subject, nevertheless, to any lien upon it acquired by the law of the country where the property is situate previous to bankruptcy (*Hunter v. Potts*, 4 T. R. 182; *Selkrig v. Davies*, 2 Rose, 291; see also *McDonald v. Georgian Bay L. Co.*, 24 Grant, 356).

As a general rule, policies of insurance will pass to the assignee (*West v. Reid*, 2 Hare, 249). But under the Statute of the late Province of (Canada 29 Vict. chap. 17: amended in Ontario by the 33 Vict. chap. 21, and 36 Vict. chap. 19), the insurance money



is payable according to the terms of the policy, free from the claims of any creditor or creditors whomsoever.

Where notice is required to complete the title to an equitable chose in action, the assignee is as much bound to use diligence in giving notice as an assignee for value, and in order to complete the title of the assignee, notice thereof should be given to the person having the legal control over or liable to pay the fund or debt, the insolvency proceedings not being notice of the assignee's title, so as to defeat the title of a subsequent assignee or purchaser for value without notice, who gives prior notice of the assignment to him (see re *Russell's Trust*, L. R. 15 Eq. 26 ; 27, L. T. N. S. 706 ; *Stuart v. Cockerell*, L. R. 8 Eq. 607 ; re *London & P. T. Co.*, L. R. 9 Eq. 653 ; *Lloyd v. Banks*, L. R. 4 Eq. 282.

The assignee takes those rights and interests which are beneficial to the creditors ; all property and assets, and all rights of action affecting such property and assets. But the assignee is not entitled to hire the bankrupt out, and he cannot, therefore, bring an action to recover for merely personal service performed by the insolvent after the assignment (*Chippendale v. Tomlinson*, 4 Dougl. 318 ; see also 13 Jur. 928 ; *Williams v. Chambers*, 10 Q. B. 337 ; *White v. Elliott*, 30 Q. B. U. C. 253).

The insolvent may, therefore, sue for all wages earned by him after the assignment, and the assignee cannot interfere (see however re *Dowling*, L. R. 4 Ch. D. 689 ; but if the action is brought before he obtains his final discharge, it is apprehended he would have to give security for costs under the 39th section of the Act.

Causes of action arising from purely personal wrongs committed against the insolvent do not pass to the assignee, but only such rights of action as affect his property and assets. The insolvent, before the assignment, sued A. for slander and enticing away his wife and assaulting her, and special bail was put in to the action by A. Before obtaining judgment, and while the action was pending, he made a voluntary assignment in insolvency under the Act of 1864. Before obtaining his discharge, he sued the bail on their recognizance, and it was held that he was entitled to recover for the causes of action, being for purely personal wrong, did not pass to the assignee (*White v. Elliott*, 30 Q. B. U. C. 253).

In such a case as this it would seem that the assignee could not intervene to prevent the insolvent going on with the suit, and, if he does not intervene, the insolvent has a clear right to recover (ib.; see also *Dunn v. Irwin*, 25 C. P. U. C. 111; *Smith v. Commercial Union Ins. Co.* 33 Q. B. U. C. 535).

In a case of this sort if there is only one cause of action it cannot be split so as to give the insolvent a right to recover special damage, and the assignee pecuniary and ordinary damage, but if there are two causes of action it would seem that the insolvent may recover in respect of one, and the assignee of the other (*Hodgson v. Sidney*, L. R. 1 Exch. 352). The right of action for a false representation whereby the insolvent sustained a pecuniary loss, was held to pass to his assignee (*Morgan v. Steble*, L. R. 7 Q. B. 611). But although the contract may be one which relates immediately to the person of the insolvent and not to his estate, still if it is stipulated that, in case of a breach, a sum of money shall be paid to him by way of penalty, and a breach takes place before his insolvency, the right of action for the penalty will pass to the assignee (*Wudling v. Oliphant*, L. R. 1 Q. B. D. 145).

Rights of action for tort pass to the assignee if they relate to real or personal property, or to the unlawful taking or detention of property, or to injuries thereto, and do not relate to mere personal injuries to the insolvent (*Noonan v. Orton*, 12 B. R. 405). The rights of action which pass to the assignee are those that are founded upon beneficial contracts made with the insolvent where the pecuniary loss is the substantial and primary cause of action, and for injuries affecting his property so far as they do not involve a claim for personal damages (*Dillard v. Collins*, 25 Gratt. 343). A right of action for damages arising from a fraudulent and deceitful recommendation of a person as worthy of trust and confidence does not pass to the assignee (*Crockett v. Jewett*, 2 B. R. 208).

A bankrupt who had never obtained his order of discharge or passed his final examination, procured employment as editor of a weekly newspaper, without the permission or knowledge of his trustee; and six years after bankruptcy he was awarded by the decree of a competent Court £104, as six months' salary in lieu of proper notice of dismissal. It was held that the assignee could

claim this money before it was paid to him, as against creditors subsequent to, and without notice of, the bankruptcy; for that first the assignee had been guilty of no breach of duty towards such creditors so as to estop him from setting up his claim; and secondly, that the money was not the proceeds of the bankrupt's personal labour subsequent to his bankruptcy, but a compensation for the breach of a contract which became part of his estate in bankruptcy (*Wadling v. Oliphant*, L. R. 1 Q. B. D. 145).

The lien of an unpaid vendor for his purchase money is not such an interest as will pass to the assignee.

Land subject to a vendor's lien for unpaid purchase money was sold under execution at a sheriff's sale to a purchaser without notice. The execution debtor subsequently repurchased the land from the sheriff's vendee in the name of a third party, who conveyed to a brother of the debtor in trust, for the latter, who having become insolvent made an assignment under the Insolvent Act of 1864; it was held that the vendor's lien attached on the lands in the hands of the assignee (*Van Wagner v. Findlay*, 14 Grant, 53).

Such is also the law in the United States (re *Perdue*, 2 B. R. 183), where it is also held that the lien is not waived by taking a mortgage on the land therefor (re *Bryan*, 3 B. R. 110; re *Hutto*, 4 B. R. 787).

The right to the rents of land vests in the assignee from the time of the assignment, and an agreement that the vendor may collect them and apply them to the unpaid purchase money is thereby terminated (*Hall v. Scodel*, 10 B. R. 295).

Where an insolvent had a contingent interest in certain property under his father's will, but at the time of the assignment the property was still subject to the control and disposition of a trustee and depended upon the latter dying without conveying or dividing the property among the other children of the testator, it was held that this interest would pass to the assignee, subject to be defeated by the trustee disposing of the property according to the will, and that such interest should have been stated as an asset in the insolvent's schedule of assets and liabilities. It was however held that omitting it from the schedule was not an act of fraud, the

insolvent swearing he was advised to omit it by his solicitor (re *Jones*, 4 U. C. P. R. 317).

And insolvent's reversionary interest in an estate passes to his assignee and entitles the assignee to maintain a suit in a proper case for the appointment of new trustees, and for an account of the estate; but the Court refused to make an order for the sale of such reversionary interest (*Gray v. Hatch*, 18 Grant, 72).

But under this section the assignment will only pass such real estate as is vested in the insolvent at the date of the assignment. If prior to the assignment, the insolvent has sold real estate and the deed has been executed, such real estate will not pass to the assignee, though the purchaser thereof neglects to register the deed until after the appointment of the assignee, and an assignee in insolvency cannot acquire priority over a prior vendee of the insolvent, by prior registration of the instrument appointing such assignee (*Collver v. Shaw*, 19 Grant, 599).

When an action is brought against a person who afterwards in the course of the proceedings pays money into the Court, it is difficult to say whether such money would pass to the assignee on the subsequent insolvency of the person paying. In England it has been held under the Bills of Exchange Act of 1855 (which empowers the judge to give leave to a defendant to appear and defend the action under certain circumstances, on paying the money into Court), that money paid into Court under the Act, pursuant to a judge's order, to abide the event of an action then pending, forms no part of the debtor's estate, but is a security to the creditor for the amount recoverable in the action, notwithstanding that the matters in dispute in the action have been referred, and bankruptcy has supervened before any proceedings are taken in the matter of arbitration (ex parte *Boomer*, 30 L. T. N. S. 620; L. R. 9 Ch. 379).

Moneys seized by a judgment creditor of the insolvent prior to the assignment, but, at the time of the assignment, pending in Court, are vested in the assignee to be divided among the creditors generally according to the provisions of the Act, subject to the seizing creditor's lien for costs under the 82<sup>nd</sup> section of the Act (*Bacon v. Douglas*, 15 L. C. R. 456).



By an assignment the insolvent's entire property is transferred to the assignee, whether included in his statement or not, and he cannot afterwards make any application founded on his property in the effects transferred.

Thus where plaintiff, a judgment creditor of defendant, proved his claim before the assignee under the Insolvent Act; afterwards, and before defendant obtained his discharge, the plaintiff issued execution on his judgment, and levied upon property which the insolvent had not included in his schedule of assets. The Court held that whether the property belonged to the defendant at the time of his insolvency, or was the property of a third person, he had no right to apply to set aside the execution, as in either case, he could have no right to it (*Jones v. Des Brisay*, Trin. T. 1871, Stephen's digest, N. B. Reports, 227).

In the Province of New Brunswick, where judgments registered form a lien upon the lands of the judgment debtor, it has been held that a judgment, a memorial of which has been registered, is a charge upon the real estate of the debtor who afterwards becomes insolvent, and that such judgment can be enforced against the real estate which belonged to the debtor and was transferred to his assignee by his assignment under the Act (*Deveber v. Austin*, 3 Pugsley, 55).

The Act secures to the insolvent certain parts of his estate which are set off to him free from the claims of creditors—of these he in fact becomes the purchaser, the consideration for the purchase being the surrender of all his estate, and the sanction for his title being in the supreme law of the land (re *Hambright*, 2 B. R. 498).

The insolvent cannot claim exemptions to the prejudice of a creditor who holds a valid lien on the property. The Legislature did not intend that the Act should override cases of that nature (re *Perdue*, 2 B. R. 183; re *Hutto*, 3 B. R. 787); and where the property claimed to be exempted is subject to a mortgage, the assignee will discharge his whole duty if he designate the exempted property, and then leaves the insolvent and mortgagee to settle their respective rights by themselves (re *Lambert*, 2 B. R. 426).

A mortgagee, therefore, who has done nothing by proof of his debt

or otherwise to waive his mortgage, may hold the exempted property as security for his debt, and this right cannot be affected by the insolvent's discharge (*Tuesley v. Robinson*, 103 Mass. 558).

The insolvent cannot claim any exemption in property conveyed by him prior to the commencement of proceedings in insolvency in fraud of his creditors, and afterwards recovered to the estate. The sale is good as against him, and in attempting to place his property beyond the reach of his creditors he placed his exemption beyond his own reach (re *Graham*, 2 Biss. 449).

Upon the death of the insolvent the title to exempted property vests in his executor or administrator (re *Hester*, 5 B. R. 285).

By the 23 Vict. chap. 25, in the Province of Ontario, the following chattels are declared exempt from seizure under any writ issued out of any Court whatever in the Province, namely :—

1. The bed, bedding and bedsteads in ordinary use by the debtor and his family.

2. The necessary and ordinary wearing apparel of the debtor and his family.

3. One stove and pipes, and one crane and its appendages, and one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six teacups, six saucers, one sugar basin, one milk jug, one teapot, six spoons, all spinning-wheels and weaving-looms in domestic use, and ten volumes of books, one axe, one saw, one gun, six traps, and such fishing-nets and seines as are in common use.

4. All necessary fuel, meat, fish, flour, and vegetables actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value the sum of forty dollars.

5. One cow, four sheep, two hogs, and food therefor for thirty days.

6. Tools or implements of, or chattels ordinarily used in, the debtor's occupation, to the value of sixty dollars.

In Quebec, by the Code Civ. Pro. Arts. 556 and 558, the following is the list of exemptions :—

1. The bed, bedding and bedsteads in ordinary use by the debtor and his family.

2. The necessary and ordinary wearing apparel of the debtor and his family.

3. One stove and pipes, and one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six teacups, six saucers, one sugar basin, one milk jug, one teapot, six spoons, all spinning-wheels and weaving-looms in domestic use, and ten volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use.

4. Fuel and food not more than sufficient for thirty days, and not exceeding in value the sum of twenty dollars.

5. One cow, four sheep, two hogs, and food therefor for thirty days.

6th. Tools and implements or other chattels ordinarily used in the debtor's occupation, to the value of thirty dollars.

7. Bees to the extent of fifteen hives.

In the Province of Manitoba, by an Act relating to homesteads, assented to May 3rd, 1871, chap. 16, of that year, the following personal and real estate are, by the Act, free from seizure by virtue of all writs of execution issued by any Court of the Province, namely :—

1st. The bed, the bedding and bedsteads in the common use of the debtor and his family.

2nd. The necessary and ordinary clothing of the debtor and his family.

3rd. A stove with its pipe, a table, the necessary and ordinary kitchen utensils and table crockery belonging to the debtor and his family, a spinning-wheel, a weaver's loom, the books of a professional man, one axe, one saw, one gun, six traps, the nets and seines used by the debtor.

4th. The necessary food for debtor's family during thirty days.

5th. One cow, two oxen, one horse, four sheep, two pigs, and the food for the same for thirty days.

6th. The tools and necessities used by the debtor in the practice of his trade or profession, to the value of one hundred dollars, in the supposition that the debtor is a mechanic, but up to the value

of two hundred dollars if the debtor is a farmer or a professional man.

7th. The articles and furniture necessary to the performance of religious services.

8th. The land cultivated by the debtor, provided the extent of the same be not more than one hundred and sixty acres, in which case the surplus may be sold, with privileges of first mortgages.

9th. The house, stable, barns, fences on the debtor's farm, subject, however, to the same privilege as mentioned in the previous clause.

In New Brunswick, wearing apparel and kitchen utensils to the amount of fifteen pounds, and in Nova Scotia the wearing apparel and bedding for the debtor and his family, and the tools or implements of his trade or calling, not exceeding forty dollars in the whole, are exempted (see as to Prince Edward Island, Local Statute, 30 Vict. chap. 18).

By an Act passed by the Legislature of New Brunswick (31 Vict. chap. 25) it is provided that the family homestead of every head of a family to the value of six hundred dollars, shall be exempt from levy or sale under execution, and provision is made for setting off the homestead in case of a *fi. fa.* in the sheriff's hands.

This section provides that nothing shall pass to the assignee, which, under any Act of a Legislature, is exempt from seizure and sale under execution. Harrison and Potter both became insolvent, and by two several deeds assigned their estates to the official assignees. At the time of his assignment, each was possessed of a house and land, on which he resided, each being under mortgage; but the equity of redemption exceeding in value six hundred dollars in each case. The assignees having advertised the properties for sale, and refusing to comply with an application of the insolvents to have a homestead set off to them, they petitioned the Judge of the Insolvent Court for an order directing the assignees to comply with such requests.

The judge having ordered the sales to proceed, and the proceeds to the amount of \$600, to be handed over to each of the insolvents; it was held that there was no power to make such an order (re *Harrison*, 2 Pugsley, 11).



In the Province of Nova Scotia, where a law as to the registration of judgments is in force, it has been held, on the Act of 1869, that a *bona fide* judgment creditor, who has duly registered his judgment in the proper office, within thirty days of the defendant's assignment, under the Insolvent Act, was entitled to priority over the assignee in insolvency (*Murdock v. Walsh*, 9 C. L. J. N. S. 198).

Goods and chattels in the possession of a mortgagee of them cannot be seized and sold, and the proceeds paid over to a sheriff, acting under a writ of attachment in insolvency against the mortgagor. The possession of a party to whom such goods are sent by the mortgagee to be sold, and their proceeds to be paid over to the mortgagee is the possession of the latter, and if the agent in such case allows the goods to be seized and sold by the sheriff, he is liable to repay them to the mortgagee (*Watson v. Henderson*, 25 C. P. U. C. 562).

Though this section provides that the assignee shall take the assets under the same charges and obligations as the insolvent, was liable to, in regard to the same; yet an assignee, under the Act, cannot be held liable on a guarantee in respect of a matter for which the insolvent was, at the date of the assignment, liable to the party holding the guarantee, and the only remedy of the latter is, to file a claim, duly attested, against the estate of the insolvent (*Hutchins v. Cohen*, 15 L. C. J. 235).

An assignee under the Act cannot be sued for the recovery of the price of real estate sold to the insolvent (*Kuper v. Stewart*, 11 L. C. J. 85).

There was a proviso in section 10 of the Act of 1869, that no pledgee of any of the effects of the insolvent, or any other party in possession thereof, with a lien thereon, should be deprived of the possession thereof, without payment of the amount legally chargeable as a preferential claim upon such effects. This proviso is not contained in the present Act, and it seems unnecessary, as the common law will sufficiently protect the pledgee or lien holder where the law as to reputed ownership does not prevail. This proviso in the Act of 1869 prevented the assignee of an insolvent recovering from a carriage-maker, a carriage in his possession be-

longing to the insolvent, it appearing that the carriage-maker had done work upon it, in the way of repairs (*Stewart v. Ledoux*, 2 *Revue Critique*, 482).

This section authorizes the assignee to institute conservatory process for the protection of the estate. Under the former Acts, a guardian, under a writ of compulsory liquidation in insolvency matters, had a right to take out a *saisie revendication* against a seizing bailiff, and the creditor, who, although well aware of the issuing of the compulsory writ, persisted in holding the estate of the insolvent, under an ordinary writ of execution; in this case, a writ of *saisie gagerie*; the bailiff was condemned, jointly and severally with the landlord, to deliver the estate to the guardian, and to pay the costs (*White v. Bisson*, 1 *Revue Critique*, 474).

All property which the insolvent becomes entitled to up to the time of obtaining his discharge passes to the assignee, but it would seem that property acquired after discharge would not pass, though the estate of the insolvent was not then wound up (see *Reg. v. Roberts*, L. R. 9 Q. B. 77; 29 L. T. N. S. 67; *Ebbs v. Boulnois*, L. R. 10 Ch. App. 479; overruling *re Bennett's Trust*, L. R. 19 Eq. 245). The assignee will take the property, with all the burthens and equities to which it was subject in the hands of the insolvent, and which are not inconsistent with the principles of the insolvent law (*ib.*; *ex parte Holthausen*, L. R. 9 Ch. App. 722).

In *Reg. v. Roberts*, *supra*, it was held that the trustee of a prisoner, who was adjudged bankrupt after his apprehension, took his property subject to an order for the costs of the prosecution being paid out of it.

So in England, the bankrupt is entitled to any property acquired by him after the close of the bankruptcy, although he has not obtained his discharge (*re Pettit's Trusts*, L. R. 1 Ch. D. 478); and he is also entitled to any property acquired by him after his discharge, although bankruptcy is not closed (*Ebbs v. Boulnois*, L. R. 10 Ch. App. 479; *re Bennett's Trusts*, L. R. 10 Ch. App. 490).

The assignee of an insolvent is not the assignee of his creditors, nor of all the judgments, executions, liens, and mortgages out-

standing against his property. He takes only the bankrupt's interest in property, nor has he the right, title, or interest which other parties have therein, nor any control over the same, further than is given expressly by the Act as auxiliary for the preservation of the insolvent's interest for the benefit of his creditors generally (*Goddard v. Weaver*, 6 B. R. 440).

Except where there is an offence against the insolvent law, or against some law in favour of creditors, the assignee is merely the legal representative of the debtor, with such rights as he would have had if not insolvent, and no other. When, therefore, M., who owed B. one hundred pounds, for which he had given no security, wrote to B., telling him that he had forged his name to a bill of exchange for one hundred pounds, which he had discounted with his bankers, that the bill was just due, and that he was unable to meet it, and entreating B. to pay the bill, and thus save him and his family from the ruin which would result from exposure, M. promised, if B. would do this, to give him a bill of sale of all his property, to secure what he owed him. B. acceded to the request. A bill of sale of all M.'s property was given to him to secure two hundred pounds, and B. paid the one hundred pounds to the bankers. Soon afterwards M. was adjudicated bankrupt. The Court held that, if there was a legal misdemeanor in compromising the forgery, the bankrupt was a party to it, and could not recover the goods from B., and that as no offence against the bankrupt law had been committed, the assignee had only the same rights as M. (*re Mapleback*, L. R. 4 Ch. D. 150).

The parties to a contract for the sale of goods have, till the rights of third persons intervene, an undoubted right to rescind the contract. If the vendee can legally rescind a contract for the purchase of goods, and does so before an assignment, or the issue of a writ of attachment, the goods will not pass to his assignee in insolvency. In the case of *Mason v. Redpath* (39 Q. B. U. C. 157), the learned Chief Justice of the Court of Queen's Bench in Ontario, assumed for the purposes of his decision (but did not decide) that the vendee could not, under the Act of 1869, rescind the contract for the purchase of goods

after the commission of an act of bankruptcy by him. In this case the goods purchased, some fifty-nine barrels of sugar, were delivered by the railway company to the vendee on the 27th and 28th of November, 1874. The vendee refused to receive them, and, with the consent of the vendor and at his instance, transferred them to another party. The vendee made an assignment on the 5th of December following, and it was held that there was a legal rescission of the contract of sale, and that the sugar did not pass to the assignee in insolvency of the vendee.

A bill of sale of chattels was executed, but not registered. The mortgagor executed a second bill of sale of the same chattels to another person, which was registered. Afterwards the mortgagor filed a petition for liquidation, and it was held that the second mortgagee was entitled as against the trustee in liquidation, to such of the chattels as had not been seized by the first mortgagee before the liquidation (ex parte *Leman*, L. R. 4 Ch. D. 23 ; L. R. 3 Ch. D. 324 ; ex parte *Cochrane*, L. R. 3 Ch. D. 324).

Where a father agreed to appoint a share of a trust fund to his son, on condition that it should be applied in recouping the father moneys which he agreed to advance for payment of his son's debts, and which he advanced accordingly, and after the debts were paid the appointment was made by the father, in ignorance that the son had in the meantime committed, an act of bankruptcy upon which he was adjudged bankrupt, it was held that the trustee of the son was not entitled to the appointed share, but that it was applicable to recoup the father (ex parte *Angerstein*, L. R. 9 Ch. App. 479).

A lease of a piece of land was granted to a trader, he covenanting to build upon it a steam saw-mill, messuages, or dwelling-houses, and at the end of the term to yield up to the lessor, the land, buildings, and fixtures, except the steam saw-mill, machinery, fixtures, and things connected therewith, which it was agreed the lessee might remove. The lessee afterwards mortgaged the property, the mortgage deed assigning the land, together with the steam saw-mill and the building thereon, and the steam-engines, boilers, fixed and moveable machinery, plant, implements, utensils fixed to, placed upon, or used in or about the ground, hereditaments, saw-mills, and buildings, to hold the hereditaments and

such of the machinery, plant, etc., as were in the nature of landlord's fixtures, to the mortgagee for the residue of the term; and as to such of the machinery and premises as were in the nature of tenant's or trade fixtures, to the mortgagee, absolutely, subject to redemption.

The deed contained a power for the mortgagee, in default of payment of the mortgage money, to sell the premises, or any part or parts thereof, either together or in parcels. The deed was not registered under the Bills of Sale Act. The mortgagor filed a liquidation petition; the mortgage money remained due; the mortgagee had not taken possession of any of the property comprised in the deed, and the Court held that the effect of the deed was to authorize the mortgagee to sever the trade fixtures from the premises, and to deal with them separately, and consequently that the deed not having been registered under the Bills of Sale Act was void, *qua* the trade fixtures as against the trustee in the liquidation (re *Eslick*, L. R. 4 Ch. D. 503).

17. The Insolvent shall, within seven days of the date of the assignment, or from the date of the service of the writ of attachment, or (if the same be contested) within seven days from the date of the judgment rejecting the petition to have it quashed, furnish the Assignee with a correct statement (Form F) of all his liabilities direct or indirect, contingent or otherwise, indicating the nature and amount thereof, together with the names, additions, and residences of his creditors and the securities held by them, in so far as may be known to him. The Insolvent shall also furnish within the same delay a statement of all the property and assets vested in the Assignee by the deed of assignment or by the writ or writs of attachment issued against him, and such statement shall in all cases include a full, clear, and specific account of the causes to which he attributes his insolvency, and the deficiency of his assets to meet his liabilities. The Insolvent may at any time correct or supplement the statements so made by him of his liabilities and of his property and assets.

The 40 Vict. s. 3 amended this section by striking out the word "ten," in the first and third lines, and inserting in lieu thereof the word "seven."

It seems that in computing the time under this section, the day on which the assignment was made, or attachment issued, would

be excluded (see *Young v. Higgon*, 6 M. & W. 49; *Williams v. Burgess*, 12 A. & E. 635).

Although the statement of assets and liabilities must be furnished by the insolvent, and left with the assignee within the seven days, yet it is not sworn to by the insolvent until the first meeting of creditors (see sec. 23).

The provision requiring the insolvent to give a full, clear, and specific account of the causes to which he attributes his insolvency, and the deficiency of his assets to meet his liabilities is introduced for the first time in the present Act. It will probably assist the creditors in determining whether a discharge should be granted. It is to be observed that under section 140, the insolvent is guilty of a misdemeanor, if, with intent to defraud his creditors, he does not, on examination, disclose fully, truly and clearly the causes to which his insolvency is owing. The same consequences follow if he wilfully and fraudulently omits from his schedule any effects or property whatsoever.

Section 61 of the Act specifies the manner of inserting the particulars of negotiable paper in the schedule of liabilities, when the holders thereof are unknown.

The existence of a properly drawn schedule of liabilities, binding on the insolvent, is a matter of the highest importance to the efficient working of the insolvent law, and the insolvent cannot obtain a discharge from any debt not inserted in the schedule, either originally or by supplement (*King v. Smith*, 19 C. P. U. C. 319).

But under the sixty-first section, if the insolvent furnishes a supplementary list of creditors previous to his discharge, and in time to admit of the creditors therein mentioned obtaining the same dividend as the other creditors upon his estate, this will be sufficient to bar the claims of the creditors whose names appear in the supplementary list (*Preston v. Hutton*, 37 Q. B. U. C. 177).

It was held that, under the Act of 1869, a statement of the insolvent's affairs must be exhibited at the first meeting of his creditors, and a list of the creditors also. The names of the creditors must also be given. But where the plaintiff was shown in the statement to be the accommodation maker of notes in favour

of the insolvent, which were held by the bank, and the name of the bank was mentioned as the creditor, it was held that the plaintiff's name was sufficiently shown as a creditor, it appearing that the plaintiff was, at the time, the actual creditor, having paid the bank shortly before the assignment, but having concealed that fact from the insolvent (*Preston v. Hunton*, 37 Q. B. U. C. 177).

It was held, under the Act of 1869, that if the schedule and statements referred to in section 3 of that Act, which corresponded with this seventeenth section of the present Statute, were not prepared by the assignee, and the insolvent was not asked at the meeting held under the section corresponding to section 23 of the present Act, to file the declaration on oath, stating whether or no such statement and schedule were correct, and the creditors did not require such schedule and statement, and there was in fact, therefore, nothing to verify the declaration on oath, the Court would not refuse to discharge the insolvent from arrest under the one hundred and forty-fifth section of the Act of 1869, corresponding to the one hundred and twenty-seventh section of this Act, on the mere ground that he had not filed the declaration on oath, referred to in the section, where the insolvent attended the meeting and submitted to be examined on oath under this section (*Hood v. Dodds*, 19 Grant, 639).

Under the Act of 1869, it was the duty of the assignee to prepare the schedule and statement, and of the insolvent to assist in the preparation, and the neglect of the assignee was held no ground for refusing the final discharge of the insolvent (re *Thomas*, 15 Grant, 196).

Under the present Statute, however, the primary duty of furnishing the statement and schedule seems to be imposed on the insolvent, and under the fifty-sixth section fraudulent retention or concealment of any portion of the estate is a ground for withholding the confirmation of a deed of composition. It is, also, a ground for withholding a discharge (see section 65).

In *Hood v. Dodds* (19 Grant, 646), in approval of the principle which this section enforces, in requiring a specific account of the causes to which the debtor attributes his insolvency, the Court declared that where creditors are called upon to accept a compo-

sition from their debtor, the least satisfaction they may demand is to know where the goods or money entrusted to the debtor have gone, and to what cause the loss is to be attributed, in order that they may learn whether for the future it is the insolvent trader they are to avoid as one incapable of carrying on that which he has undertaken, or the class of business in which he has been engaged as one apt to lead to bankruptcy (*Hood v. Dodds*, 19 Grant, 646; see sections 56, 65, and 140).

The Act in force in the United States provides that every bankrupt shall be at liberty from time to time upon oath to amend and correct his schedule of creditors and property so that the same shall conform to the facts. Under this Act, it is held that the application for leave to amend is *ex parte*, and no notice is necessary. No creditor has a right to oppose the application. The allowance of an amendment does not prejudice the rights of a creditor. He is not a party to the proceeding, and is not estopped by the order (re *Watts*, 2 B. R. 447; re *Heller*, 5 B. R. 46). The insolvent has a right to amend his schedules by striking out the names of persons who have been improperly and inadequately inserted as creditors (ib.).

In the United States the term "assets" has been held to include the following things, to wit: A claim for unliquidated damages (re *Orne*, 1 B. R. 57); property conveyed to the insolvent in fraud of the creditors of the grantor (re *O'Bannon*, 2 B. R. 15); a vested interest expectant on the termination of a life estate (re *Bennett*, 2 B. R. 181); an insurance on the debtor's life for the benefit of his wife, whereon premiums have been paid by the debtor after his insolvency (re *Erben*, 2 B. R. 181); property in the possession of the debtor which belongs to a firm of which he has been a member (re *Beal*, 2 B. R. 587); the interest of the debtor in the rights of action and credits of a firm of which he was a member, although his interest in the firm has been levied on and sold (*Moore v. Rosenberger*, 4 W. J. 204); property conveyed by the debtor in fraud of his creditors (re *Hussman*, 2 B. R. 437); property in the possession of the debtor covered by a fraudulent assignment, to which the creditors have never assented (*Ashley v. Robinson*, 29 Ala. 112).



Property held *de facto* though by a defeasible title (re *Beal*, 2 B. R. 587).

The husband's share in property left to him in trust for the sole and separate use of the wife during her life and, after her death, to be equally divided between the husband and the children, share and share alike, even though there is a provision in the will that the property shall not be liable to the payment of the debts of any present or future husband (re *Myrick*, 3 B. R. 154).

The interest of the bankrupt under a will in an estate in expectancy (re *Connell*, 3 B. R. 443).

The term assets has been held not to include the following things to wit: The right to a share in the net profits of a business conducted in the name of the insolvent, allowed as a compensation for services (re *Beardsley*, 1 B. R. 304; re *Brum*, 5 Law Rep. 121); property held by a trustee for the benefit of the insolvent's wife, wherein the insolvent's equitable interest has been sold under execution (re *Pomeroy*, 2 B. R. 14); money invested in the name of the insolvent's wife which has been earned by her (re *Hummitsh*, 2 B. R. 12); a claim against a person for falsely recommending another as worthy of trust (*Crockett v. Jewett*, 3 B. R. 208); a *chose in action* on which a suit has been brought but which has been assigned in good faith for a full and valuable consideration (*Valentine v. Holdman*, 63 N. C. 475).

18. The Insolvent may present a petition to the judge at any time within five days from the service of the writ of attachment; and may thereby pray for the setting aside of the attachment made under such writ, on the ground that the party at whose suit the writ was issued has no claim against him, or that his claim does not amount to two hundred dollars beyond the value of any security which he holds, or is not provable in insolvency, or that his estate has not become subject to liquidation, or for want of, or for a substantial insufficiency in the affidavit required by section nine; or if the writ of attachment has issued against a debtor by reason of his neglect to satisfy a writ of execution against him as hereinbefore provided, then on any of the above grounds or on the ground that such neglect was caused by a temporary embarrassment, and that it was not caused by any fraud or fraudulent intent, or by the insufficiency of the assets of such debtor to meet his liabilities; and such petition shall be heard and determined by the judge in a summary manner, and conformably to the evidence adduced before him thereon; and the judgment subject to appeal as hereinafter provided, shall be final and conclusive.

The 39th Vict. chap 30, s. 3, amended the above section, by inserting after the word "liquidation" in the ninth line, the following words, "or for want of, or for a substantial insufficiency in the affidavit required by section nine."

The time for contesting the attachment under this section, will be computed on the same principle as the time for furnishing statement &c., is computed under the preceding section of the Act. The day of service of the attachment will be excluded (see ante, p. 110-111).

Under this section relief may be granted to the insolvent in the following cases: (1) Where the party, at whose suit the writ was issued, has no claim against him; (2) or his claim does not amount to \$200 beyond the value of any security which he holds; (3) or is not provable in insolvency; (4) or his estate has not become subject to compulsory liquidation. These, probably, are matters which the debtor must, in most cases, shew by counter affidavits, as it is not likely that the petitioning creditor's own affidavit should shew that he had no claim against the insolvent. The Act of 1875 did not, as we have seen, expressly empower the insolvent to object to the want of, or to the sufficiency of, the affidavit required by section nine of this Act; but it was, nevertheless, held that, when a debtor applied to set aside an attachment against him under this section, he could object to the sufficiency of the creditor's affidavit under section 9, or could object to the want of it, in the same manner as a creditor is empowered to do under section 14. Although this section only specifies certain grounds on which the debtor may apply, still it seems that he may take advantage of any defects appearing on the creditor's case, for he can object to the creditor's case on the face of it, as well as show by *contra* evidence that it is not maintainable, and if the debtor can show that the writ never should have issued, he is entitled not only to have the attachment made under the writ set aside, but also the writ itself, in like manner as a creditor is entitled under section 14, though the section speaks only of the debtor setting aside the attachment made under the writ (*McDonald v. Cleland*, 6 P. R. U. C. 289).

Under the 26th section of the Act of 1869, a debtor could not

petition against the attachment, if he had previously petitioned against the demand preceding the writ. The grounds for contesting the demand under section 5, are very similar to the grounds specified in the section now under consideration. But there seems no objection to the insolvent's contesting the attachment under this section, though he has also contested the demand under section 5 of the Act, and, in some cases, the attachment will be issued without demand.

It was held under the Acts of 1864-5, by Hughes, Co. J., that a judgment creditor of the insolvent, who had an execution against the insolvent in the hands of a bailiff of the Division Court, might move to set aside the proceedings in compulsory liquidation. The former Acts were similar to section 15 of the Act of 1869, and contained no provision for setting aside proceedings at the instance of any one but the insolvent himself (*Hillborn v. Mills*, 5 U. C. L. J. N. S. 41; Hughes, Co. J.)

In the opinion of the writer, the case of *Hillborn v. Mills* cannot be sustained on the above point. It is opposed to the decision in *City of Glasgow Bank v. Arbuckle* (16 L. C. J. 218). In the latter case it was held, on section 26 of the Act of 1869, where a writ of attachment issued against a firm who took no proceedings to contest it within the time allowed by law, that an individual creditor of one of the firm had no right to petition against the attachment; and in *Watson v. City of Glasgow Bank* (14 L. C. J. 309), the right was held personal to the debtor, and not exercisable by his assignee. In this case, a writ of attachment issued against a firm who took no steps under the Act to contest it, but one of them made a voluntary assignment to another assignee, and it was held that the latter had no right to set aside the attachment (ib.), neither had a creditor of the partner who made the separate assignment such right (*City of Glasgow Bank v. Arbuckle*, 16 L. C. J. 218).

In the latter case, a writ of attachment was issued at the instance of persons who became creditors of a firm before its dissolution, and the partnership property was attached thereby; but the Court held that an individual creditor of one of the partners had no right to oppose the attachment (*City of Glasgow Bank v. Arbuckle*, 16 L. C. J. 218).

The proceedings under this section must be taken within the time specified. When a debtor, against whom a writ of attachment issued, took no proceedings to set aside the same for the period of six months, but during that period acquiesced in the proceedings, it was held that it was then too late to set the same aside (*Fulton v. Lefebvre*, 21 L. C. J. 23).

Under the Act of 1864 it was held that the defendant would not be allowed to appear in the cause after the expiry of five days from the return day of the writ, even though his motion to that effect was supported by affidavit, that it was through an error on the part of his attorneys that the appearance was not filed before the expiry of the five days, and one of the attorneys swore that, in his belief, the insolvent had a serious defence (*May v. Larue*, 10 L. C. J. 113; 1 L. C. J. 97).

19. A copy of the deed of assignment or a copy of the writ of attachment, as the case may be, certified by the assignee, or in Quebec by the proper notary or by the clerk of the Court, shall forthwith be registered in the registry office of the county wherein the insolvent resides, and also in every county or registration district wherein he may have any real estate; in the Province of Quebec such copy of the deed of assignment or writ of attachment shall be accompanied by a description of the real estate belonging to the insolvent, and shall be registered in the county or registration district wherein the same is situate, with a notice that the same has, by such assignment or writ of attachment, been transferred to the assignee.

The 40 Vict. sec. 4, amended this section by adding after the word "or" in the third line, the words "in Quebec by the proper notary, or by," and adding after the word "such" in the seventh line, the words "copy of the."

This section contains a new provision in requiring a copy of the writ of attachment to be registered. The Act of 1869 only required the assignment to be registered when the insolvent possessed real estate. Now registration is necessary in all cases in the county or district where the insolvent resides.

Although this section requires the registration to be made forthwith, it is apprehended this means forthwith after the delay within which the attachment may be contested, or after the rejection of the contestation, if made.

In the United States it has been held that the title of a party who claims under the assignee will prevail against a party who obtained a conveyance from the insolvent after the commencement of the proceedings in insolvency, with notice of such title, although the assignment to the assignee was not acknowledged and recorded according to the laws of the State where the land was situated (*Brady v. Otis*, 14 B. R. 345).

According to the decision in *Parlee v. Agricultural Ins. Co.* (3 Pugsley, 476), on the Act of 1869, the assignment will not pass the title to the insolvent's real estate to the assignee unless it is executed and registered as required by the Act.

The decision in the latter case was, that the assignment not being executed in duplicate, or registered, the property never left the debtor, and he still had an insurable interest therein. The seventh section of the Act of 1869 required the assignment to be in duplicate. This decision may be sustained, so far as it is based on the ground that, by reason of the defective execution, the instrument was not really an assignment within the Act. If the assignment is properly executed, it will surely pass the property to the assignee. The non-registration is a subsequent matter which cannot affect his title, whatever effect it may have on purchasers from him. Even if the assignee does not act on the assignment a re-conveyance by sufficient deed at common law, would seem necessary to divest the estate. The 30th section of the Act prescribes a form of conveyance on transfer of the property, from the official to the creditors' assignee. This form being statutory is sufficient, if complied with, to transfer the estate. But under section sixty of the Act, where no form is provided for the reconveyance of the estate from the assignee to the insolvent, the instrument of reconveyance must be sufficient to pass the property at common law.

The Court, in *Parlee v. Agricultural Ins. Co.*, supra, expressed an opinion that, if the deed of assignment were properly executed, no insurable interest would remain in the debtor; but they seemed to be of opinion that, without registry, the property would not pass to the assignee.

The purpose, in requiring the assignee to cause the assignment

to be recorded, is, that every purchaser of land at an assignee's sale may have recourse to a certified copy of such registry, as a link in his chain of title in any suit he may bring for the possession, or in any suit in respect to the property which he or his heirs, or others claiming under him, may desire to bring thereafter. The object is not to vest the title in the assignee, for he has title though the assignment may never be recorded; and the assignee may use it as evidence of his title in the Court, though the same may not have been recorded (re *Neale*, 3 B. R. 177; *Holbrook v. Coney*, 25 Ill. 543). The assignment itself passes the property, and all subsequent purchasers are affected accordingly, whether they purchased before assignment actually made, or afterwards. A purchaser from the insolvent, after assignment, although he has no notice thereof, will take no title. The question of notice cannot arise, the purchase being of what the insolvent debtor had at the time; and, all his interest having passed to the assignee previously, the purchaser acquires no title as against the assignee (*Davis v. Anderson*, 6 B. R. 145).

20. Immediately after the assignment shall have been made, or in the case of an attachment, ~~immediately after the delay~~ within which the attachment can be contested or immediately after the contestation has been rejected, or, with the consent of the insolvent, immediately after the writ shall have been returned, the official assignee shall forthwith call a meeting of the creditors of the insolvent to be held within twenty-one days at the place and on the day and hour to be mentioned, notice of which meeting, in the Form G, shall be published at least once in the Official Gazette and once in one local or the nearest published newspaper, the first publication of which notice shall be at least ten days before the day fixed for such meeting; provided always, that, if the assignee omits to call such meeting to be held within the time above limited, the judge shall, on the application of the assignee, or of any creditor, order the meeting to be called for the earliest possible day thereafter; and, should the said omission have arisen from the negligence of the assignee, the judge shall order him to pay the costs of the application: provided also that, on application of any creditor, the judge on being satisfied that there are creditors of the insolvent whose unsecured claims amount to at least one-third of his direct liabilities, resident in any place from whence their attested claims cannot with due diligence be received before the day of the meeting, may order that the meeting be adjourned to some day not more than a week thereafter, a copy of the order shall forthwith be served on the assignee who shall forth-

with, by prepaid letter or circular, notify each creditor of the adjournment. In case such order be made, no business shall be transacted at the meeting which shall stand adjourned according to the terms of the order.

The 39 Vict. chap. 30, s. 4, amended this section by striking out the word "twice" in the third line from the end thereof, and inserting in lieu thereof the word "once" and by inserting after the word "Gazette" in the same line the words following, "and once in one local or the nearest published newspaper."

The 40 Vict. s. 5, also amended it by adding after the word "held" in the seventh line the words "within twenty-one days" and by striking out the words "three weeks" in the eleventh line and inserting in lieu thereof the words "ten days" and by adding immediately after the last word in the section the proviso given above (see also 40 Vict. s. 38).

The meeting is now to be held within twenty-one days from the assignment, although the notice, form G, need not be published until ten days before the meeting.

It is important that the notice, form G, under this section, should state also that the meeting is called for the ordering of the affairs of the estate generally, for, in such case, all the matters and things respecting which creditors may vote, resolve or order, or which they may regulate under the Act, may be voted, resolved, or ordered upon, and may be regulated at such meeting without having been specially mentioned in the notices calling such meeting (see sec. 103). It would seem that the 101st section of the Act does not apply to the first meeting of creditors.

Notices need not be sent to creditors whose debts are illegal, as in the case of illegal societies (*ex parte Day*, L. R. 1 Ch. D. 699).

This section does not show where the meeting is to be held, nor does the notice, form G, throw any light on the matter. There seems no doubt it ought regularly to be held at the office of the assignee (see section 34).

Under the 2nd section of the Act of 1869, the first meeting of creditors was to be called at the insolvent's place of business. A meeting for the public examination of the insolvent, under the 109th section, could only be called to be held at the county town

of the county in which the assignment was made, and the notice calling the meeting was required to be published in the *Gazette*, and also in a newspaper published at or nearest to the place where the proceedings were carried on. Where an assignment was made at Brantford and filed in the County Court of the county, but a meeting for the public examination of the insolvent was called to be held in Hamilton, and the notice calling the meeting was published in a Hamilton paper only, besides the *Gazette*, the notice of the meeting was set aside on the application of the insolvent, and it was held that the insolvent might also set aside any proceedings at the meeting so far as they related, to his own examination, but as the meeting was also called for "the ordering of the affairs of the estate generally," anything done in furtherance of that object could only be impeached by a creditor, for the insolvent was not interested therein (re *Atkins*, 2 U. C. L. J. N. S. 25 ; Jones, Co. J.).

The 109th section required that the insolvent be summoned to attend the meeting for his examination. It was not necessary that a judge's order for his attendance should be procured; but if the assignee notified him to attend, that was sufficient (ib.).

A meeting of creditors duly convened under the Insolvent Act may be lawfully adjourned to a subsequent day without repeating the advertisements and notices required for meetings of creditors (re *Macfarlane*, 12 L. C. J. 241; see also ex parte *Till*, L. R. 10 Ch. App. 631).

In this case, a meeting was called by advertisement, for the public examination of the insolvent, and the ordering of the affairs of the estate generally, to take place on the 12th May. The meeting was then held, and adjourned to the 9th June, when it was again held and adjourned to the 23rd of June, and then again it was held and adjourned to the 1st of September, at which meeting the removal of the first assignee, and the appointment of a second, took place.

It was held, that the adjourned meetings might be considered the same, as the meeting originally called, that no notice to the first assignee was necessary, and that the meeting on the 1st of



September was regular without repeating the notices and advertisements.

21. The assignee shall also forward by mail, prepaid and registered, at least ten days before the meeting takes place, a notice of such meeting, and a list of the insolvent's creditors, and the amounts of their respective claims, to every creditor mentioned in the original or any corrected or supplementary list or statement furnished by the insolvent, or who may be known to him to be a creditor, and give such other notice as the circumstances of the case may require.

The 40 Vict. s. 4, amended this section, by adding after the word "mail" in the first line the words "prepaid and registered," and by striking out in the second line the words "in writing," and inserting in lieu thereof the words "of such meeting, and a list of the insolvent's creditors, and the amounts of their respective claims;" and by striking out all after the word "require" in the seventh line to the end of the section.

Under this section the computation of time is different from what it is under some of the preceding sections. The notice must be forwarded at least ten days before the meeting. This is equivalent to ten clear days, for where an act is required to be done so many days at least before a given event, time must be reckoned excluding both the day of the act and that of the event (*Rez v. Justices, &c.*, 3 B. & Al. 581; *Zouch v. Empsey*, 4 B. & Al. 522; *Reg. v. Justices, &c.*, 8 A. & E. 173; *Mitchell v. Foster*, 12 A. & E. 472; *Morell v. Wilmott*, 20 C. P. U. C. 379, per Gwynne, J.).

#### EXAMINATION OF INSOLVENTS.

22. The creditors at their first meeting held at the time and place fixed for that purpose, may appoint one of themselves as chairman of the meeting; and at all subsequent meetings the assignee shall be chairman in default of an appointment of chairman by the creditors.

The 40th Vict. (section 7) amended this section by adding thereto the words "in default of an appointment of chairman by the creditors." This amendment gives the creditors the power to appoint a chairman at all subsequent meetings, if they think

fit so to do. It is improper for the official assignee to act as chairman at this meeting (re *Harris*, 12 C. L. J. N. S. 251).

For the meaning of the words "default of appointment," in this section, see notes to section 29 of the Act.

23. The insolvent shall be bound to attend at the first meeting of his creditors, and after making such corrections as he may deem proper to his statements of liabilities and assets, shall attest the same under oath. He may also be examined under oath before the assignee, by or on behalf of any creditor touching his affairs; and more especially as to the causes of his insolvency and the deficiency of his assets to meet his liabilities.

The insolvent may be examined under this section, when present at the meeting, without any order being obtained for such examination. The examination may be on behalf of any creditor. In reference to proceedings at meetings, section 2 (*h*) defines a creditor to signify any person who has proved a claim to the amount of one hundred dollars or upwards. Has a creditor a right to examine if he has not proved a claim to the amount of one hundred dollars? It would seem that he is not a creditor within this section unless he has done so. The assignee is the proper party in this case to administer the oath to the insolvent, when the latter is examined before the assignee. "The Interpretation Act" (31 Vict. chap. 1, s. 7), "Sixteenthly: providing that in every case where an oath or affirmation is directed to be made before any person or officer, such person or officer shall have full power and authority to administer the same and to certify its having been made." The oath which the insolvent is required to take as to the correctness of his statements of liabilities and assets seems to be placed on a different ground. It should properly be taken before a commissioner or person authorized to take such affidavit in the respective Provinces.

When the insolvent neglects or omits to give a full and satisfactory statement of his affairs at the meeting, it is only reasonable that his examination should be adjourned until such statement is given. In England, under the 19th section of the Act of 1869, and No. 140 of the Bankruptcy Rules, 1870, the examination may be adjourned at the discretion of the Court, and it would

seem to be the duty of the Court to adjourn the examination of the bankrupt, if the statement of his affairs, filed pursuant to section 19 of the Act, be insufficient to inform the trustee of all the facts relating to the estate, and the bankrupt's dealings therewith (ex parte *Milne*, 28 L. T. N. S. 175 ; L. R. 8 Ch. App. 569).

A power to adjourn is incident to the power to examine (ex parte *Crumpp*, L. R. 1 Ch. D. 530; ex parte *Till*, L. R. 10 Ch. App. 631 ; 32 L. T. N. S. 521).

In England there is no authority for putting written requisitions to the bankrupt (ex parte *Crumpp*, supra).

It is the duty of the assignee to call upon the insolvent for the fullest information respecting his property and affairs, to point out to him the precise matters as to which he requires information or explanation, and to assist him so far as he can in making out his accounts so that they may be as complete as possible when the insolvent comes up for examination ; and, if the assignee has any difficulty in procuring proper explanations or information from the insolvent, he must apply to have him examined before the Court (re *Lawrence*, 22 L. T. N. S. 246 ; ex parte *Crumpp*, L. R. 1 Ch. D. 530).

It has been held in Quebec that an insolvent cannot be cross-examined by his counsel on his examination by the creditors in Court (re *Lamontagne*, 2 Quebec Law Reports, 156).

A debtor refusing to answer under the advice of his solicitor, would do so at his own peril (ex parte *Mackenzie*, L. R. 10 Ch. App. 88).

24. The insolvent shall sign his examination or declare the reasons why he refuses to sign, and the examination shall be attested by the assignee.

25. The insolvent shall, at all times until he shall have obtained a confirmation of his discharge, be subject to the order of the Court or judge, and to such other examination as the judge, the assignee, the inspectors herein-after mentioned, or the creditors may require ; and he shall, at the expense of the estate, execute all proper writings and instruments, and perform all acts required by the Court or judge touching his estate : and in case the insolvent refuses to be sworn or to answer such questions as may be put to him, or to sign his answers or the writings or instruments, or refuses to perform any of the acts lawfully required of him, such insolvent may be committed and punished by the Court or judge as for a contempt of court.

The insolvent will not be allowed to protect himself by any technical rules as to evidence from making a full discovery of his affairs, and therefore, although according to the established practice of the English Courts, founded upon the principles of the common law, no man is bound to criminate himself, still in furtherance of the great object of the bankrupt laws to procure a discovery and equal distribution of the bankrupt's property amongst all his creditors, a qualification of this rule has prevailed in bankruptcy; and it is now well settled that a bankrupt is bound to answer all questions respecting his property, be the consequences what they may, with this exception, that he cannot be required to answer a question whether he has done some specific act clearly of a criminal nature (*ex parte Kirby*, M. & M. 225; *ex parte Heath*, 2 D. & E. 114). He cannot, however, when examined touching his estate, trade or dealings refuse to give any information respecting them, merely because such information may incidentally show that he has been guilty of some crime or misdemeanor (*ib.*), and his examination may be used as evidence against him on a criminal charge (*Reg. v. Widdup*, L. R. 2 C. C. R. 3; Robson, 3rd Ed. 581).

In the United States it is held that an insolvent is bound to answer all questions respecting his property, be the consequences what they may, with this exception, that he cannot be required to answer a question whether he has done some specific act clearly of a criminal nature. He cannot, however, when examined touching his estate, trade or dealings, refuse to give any information respecting them merely because such information may incidentally show that he has been guilty of some crime or misdemeanor (Robson, 3rd Ed. 581; *re Bromley*, 3 B. R. 686).

The insolvent must state whether or not he has played cards, faro or any other game of chance with a certain person named in the interrogatory, and whether he has lost any money at games of chance; even though he declines to answer on the ground that his answers would criminate or degrade himself (*re Richards*, 4 B. R. 93).

The Court has no power to order the trustee to deliver written requisitions for the examination of the bankrupt, as to matters on which he requires information, although it would seem that it

may order written questions to be put to the bankrupt at the request of the trustee (*ex parte Crump*, L. R. 1 Ch. D. 530).

A creditor is not debarred from his right to examine the insolvent under oath before a Judge, by the mere fact that a composition deed, purporting to be duly executed, has been deposited in Court, and that notice has been given by the insolvent of his intention to seek its confirmation, and such insolvent may be examined by a creditor at any time before the deed is confirmed (*re Bowie*, 13 L. C. J. 191).

It would seem that under this section the insolvent might be examined at any time after the issue of the writ of attachment, or the making of the assignment, although before the first meeting of creditors. If the insolvent is examined at the first meeting of his creditors under the 23rd section no order for such examination is required. Under this section an order for the examination must be obtained from a judge. In one case within the writer's experience (*re Weekes*), the late Judge Duggan made an order for the examination of a debtor on whom a demand had been served under section 4 of the Act, requiring him to assign, and such order was made, although a petition was then pending on the insolvent's behalf, under section 5 of the Act, to set aside the demand, and no assignment had been made or attachment issued. The grounds on which the order was made were that, from the examination, evidence might be obtained, clearly showing the debtor's insolvency. This section says the "insolvent" shall at all times, &c., be subject to examination, and it seems very doubtful whether a debtor is an "insolvent" within the meaning of the section, merely because a demand is served upon him—as the decision of the learned judge goes so far as to hold that, by the service of the demand, the debtor is an "insolvent" within the section. Section 2(*f*) defines an insolvent as a debtor subject to the provisions of the Act, unable to meet his engagements, or who shall have made an assignment of his estate for the benefit of his creditors. If there were an admission of insolvency by the debtor, after the demand made, the case would be different, but where the debtor is contesting the demand, and prior to an adjudication it is submitted the Act does

not authorise his examination. In the United States it is held that a debtor may in certain cases be examined prior to adjudication (re *Salkey*, 9 B. R. 107; re *Mendenhall*, 9 B. R. 285; re *Hensted*, 5 Law Rep. 514). But this power seems to spring from the different procedure which obtains there.

It was held in the Province of Quebec, under a section of the Act of 1864 (section 10, s.s. 2), similar to this section, that an insolvent or party summoned for examination as to his estate, and effects upon oath under the Act could not be cross-examined (re *Fraser*, 12 L. C. J. 272).

The insolvent is subject to examination until he obtains a confirmation of his discharge, and he should attend personally when making application for the confirmation, in order that he may then be examined by any creditor (see also section 65).

The time to examine the insolvent does not expire with the making of his application for his discharge (re *Solis*, 4 B. R. 68). The words "at all times" must be read in connection with the subsequent sections of the Statute. All these provisions tend to shew that it is only until his discharge that the insolvent is under the summary jurisdiction of the Court to be proceeded against by order in its discretion. He cannot, therefore, be required to submit to an examination after he has obtained his discharge (re *Dale*, 7 B. R. 538).

The insolvent is entitled to a reasonable time after notice of the application for his examination, but such time depends on the circumstances of the particular case, the distance he is from Court, or the place of his examination, and, also, upon what, if any, particular facts he is to be examined (re *Bromley*, 3 B. R. 686).

If the insolvent on examination admits the possession of property, he must clearly account for the same to the satisfaction of Court, otherwise he will be held to still have it in his possession, and to be able to hand it over to the assignee; and on failing or refusing to account in a reasonable manner for the disposition of assets which are traced to him, he may be committed for contempt (re *Salkey*, 11 B. R. 423). The insolvent is made subject to the order of the Court or judge, not for the purpose of punishment, but to enable the Court to enforce the distribution of his

estate according to the provisions of the Act (re *Brimley*, 3 B. R. 686).

An order was recently made in Montreal, directing an insolvent to pay over a sum of money which he admitted having in his possession.

26. The Court or judge may also, on the application of the assignee, of the inspectors, or of any creditor, order any other person, including the husband or wife of the insolvent, to appear before the Court or judge or the assignee, to answer upon oath any question which may be put to him or her touching the affairs of the insolvent, and his conduct in the management of his estate; and in case of refusal to appear, or to be sworn, or to answer the questions submitted, such person may be committed and punished by the Court or judge as for a contempt of court.

The 39 Vict. chap. 30, s. 5, amended the section by inserting after the word "answer," in the fifth line thereof, the words "upon oath;" and by striking out the word "and" in the eighth line, and inserting in lieu thereof the words "or to be sworn or."

In Ontario, the 36 Vict. chap. 10, s. 10, provides that no husband shall be compellable to disclose any communication made by his wife during the marriage; and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.

In passing the Insolvent Act, the Legislature must, as we have seen, be deemed to have had the existing law in view, and therefore in Ontario, the section of the Act relating to evidence would probably still apply.

It has been held that the insolvent is not entitled to claim payment of his expenses before being sworn. The 113th section of the Act of 1869, provided that, for every attendance, the insolvent should be paid such sum as should be ordered as such meeting, not less than one dollar (*Worthington v. Taylor*, 10 U. C. L. J. 304; *Logie, Co. J.*). There is nothing in this or the preceding section authorizing the payment of conduct money to the insolvent on his examination. Probably, therefore, the insolvent is bound to attend without being paid (re *Okell*, 1 B. R. 303; re *McNair*, 2 B. R. 219).

But a witness appearing for examination under this section is

not bound to give evidence until his expenses are paid (*Worthington v. Taylor*, 10 U. C. L. J. 304, Logie Co. J.; re *McNair*, 2 B. R. 219).

The wife of the insolvent is entitled to witness fees for attendance and travel, the same as any other witness (re *Griffen*, 1 B. R. 371); and she is not bound to appear unless the fees are paid or tendered to her at the time of the service of the order (re *Van Tuyl*, 2 B. R. 70; see also section 113).

In the United States, it is held that an assignee may be subpoenaed and required to testify in the same manner as any other witness (re *Smith*, 14 B. R. 432); also that a preferred creditor may be examined on the application of the assignee (*Garrison v. Markley*, 7 B. R. 246).

It was held under the 112th section of the Act of 1869, that any person, whether a creditor of the insolvent or not, might be examined as to the estate and effects of the insolvent, and that a person summoned as a witness could not refuse to give evidence respecting his own dealings with the insolvent, by alleging that he was a creditor, but that such examination would not be pressed against a person claiming to be a creditor, unless it appeared necessary in the interest of the creditors that the examination should proceed (re *Hamilton*, 1 U. C. L. J. N. S. 52; Logie, Co. J.).

It is important to consider whether a creditor of the insolvent can be examined under this 112th section. In case of fraudulent dealings between the insolvent and one of his creditors, to the prejudice of the others, very material information might be obtained by such examination, and there seems nothing in the section to prevent an order for the examination of any creditor.

It was held under section 10, sub-section 4, of the Act of 1864, that the wife of the insolvent could not be examined as to his estate and effects (re *Feron*, 10 L. C. J. 111; 1 L. C. L. J. 99); but this section now alters the law in that respect, and in providing for the examination of the "husband" of the insolvent, it shows that the framers of the Act contemplated the case of the estate of a married woman being administered in insolvency.

A petition for the examination of witnesses in insolvency should set forth satisfactory reasons for the examination—an order for



such examination made on the day of the assignment of a partnership estate by two out of three partners of whom the firm consists is irregular (*re Lusk*, 17 L. C. J. 47).

There is nothing in this section indicating the time when the application may be made. Probably at any time after the delay for contesting the assignment or writ of attachment.

A reasonable time ought to be allowed a witness after the service of the summons for his attendance for examination (*Groocock v. Cooper*, 8 B. & C. 211); but the fact of his private business requiring his attention will not, as a general rule, be allowed as a sufficient impediment to his complying with the order (*ib.*), and he is bound to wait until he is examined or until his attendance for that purpose is dispensed with (*Wright v. Maule*, 16 M. & W. 527). A witness is bound to answer all lawful questions provided they are material and pertinent to the enquiry respecting the insolvent or his trade, dealings, or property—a witness, therefore, may be asked as to the residence of another person who can give information respecting the insolvent or his property. But if his knowledge of such residence was obtained confidentially, as the solicitor of such person, he will not, on the ground of privilege, be bound to answer the question (*ex parte Campbell*, L. R. 5 Ch. App. 703).

The words “any creditor” in this section mean any creditor who has proved his claim. Before a creditor can apply for an order to examine the insolvent he must prove his claim (*re Ray*, 1 B. R. 203; see also, section 2 (*h*)).

The insolvent and all other persons are subject to examination at all times, at the instance of the assignee or of any creditor or of the Court. A creditor may make an application at any time after he has proved his debt (*re Baun*, 1 B. R. 5; *re Brandt*, 2 B. R. 215). Every creditor has the right to examine the insolvent. Such examination enures to the benefit of all the creditors. But the fact that one creditor has examined the insolvent is no reason for withholding the privilege from another creditor (*re Adams*, 2 B. R. 272; *re Gilbert*, 3 B. R. 152). But whether the Court in the exercise of its discretion will direct a second examination depends on the facts of each particular case (*re Frisbie*, 13 B. R. 349); and, if a full examination has been already had, either upon the applica-

tion of the assignee or of any other creditor, a subsequent application may be denied, unless it is made to appear that the first examination was either collusive or deficient in some material and specified particulars (ib.). A distinction may, perhaps, be drawn in the case of one examination being by the assignee, and another by the creditors. An assignee might not direct his enquiries to the matters which would be of interest and importance to the creditors—a creditor, therefore, might have a right to examine from his standpoint.

In England, the 166th Rule in bankruptcy, 1870, allows the issue of a subpoena for the attendance of a witness, on the application of “a debtor.” Where it appeared that if proof by a mortgagee, tendered for a large amount, were rejected, there would be a surplus in the estate for the debtor, and the trustees, with the sanction of the committee of inspection, made an arrangement with the mortgagee to admit the proof at £20,000, on the terms that he was to receive nothing until the other creditors had received 18s. in the pound; on application by the debtor, an order was made for the examination of the mortgagee (ex parte *Austin*, L. R. 4 Ch. D. 13).

In England, the trustee himself may be summoned for examination as to the property of the bankrupt (re *Taylor*, L. R. 13 Eq. 408). There it is held, that a question cannot be put to the bankrupt which does not touch his trade, dealings, or estate, or the direct object of which is to shew that he has committed a criminal act; yet he cannot refuse to answer a question which does touch his trade, dealings or estate, although the answer may tend to shew that he has concealed his effects, or been guilty of any other offence connected with his bankruptcy (see *Reg. v. Scott*, 25 L. J, M. C. 129; *Reg. v. Robinson*, L. R. 1 C. C. R. 80; *Reg. v. Widdop*, L. R. 2 C. C. R. 3).

The 96th section of the English Act of 1869 provides that the Court may, on the application of the trustee, summon before it the bankrupt, or his wife, or any person whatever, known or suspected to have in his possession, any of the estate, or effects belonging to the bankrupt, or supposed to be indebted to the bankrupt, or any person whom the Court may deem capable of giving information respecting the bankrupt, his trade, dealings, or

property. Under this section, it is held that a creditor who makes a *prima facie* case for the examination of the bankrupt, or any other person, may apply for his examination, if the trustee is unwilling to do so, subject nevertheless to the risk of having to pay the costs (ex parte *Swift*, 26 L. T. N. S. 226); and that this right extends to the examination of the trustee himself (ex parte *Crossley*, L. R. 13 Eq. 409).

A solicitor acting for two clients in the same matter is privileged, upon examination before the Court, from disclosing to one client professional instructions given him by the other (ex parte *Assignees v. Ubsdell*, 27 L. T. N. S. 460).

#### ASSIGNEES AND INSPECTORS.

27. The Governor in Council may appoint in the several Provinces of Canada, except the Province of Quebec, one or more persons to be official assignee or assignees or joint official assignee in and for every county; and in the Province of Quebec, such appointment of an official assignee, or official assignees, or joint official assignee, shall be made in and for each judicial district in the Province, except that in each of the judicial districts of Quebec, Montreal, and St. Francis respectively, such appointment may be made either for the whole district or for one or more electoral districts in the same; and the word "district" shall mean either a judicial or an electoral district, as the context may require.

Under the Act of 1869, section 31, the power of appointing official assignees was vested in the Board of Trade for the county or district in which the board existed (as to appointments under the Act see *Newton v. Ontario Bank*, 13 Grant 652; *Blakeley v. Hall*, 21 C. P. U. C. 138).

28. Each person so appointed assignee or joint assignee shall hold office during pleasure, and before acting as such shall give security for the due fulfilment and discharge of his duties in a sum of two thousand dollars, if the population of the county or district for which he is appointed does not exceed one hundred thousand inhabitants, and in the sum of six thousand dollars, if the population exceeds one hundred thousand, such security to be given to Her Majesty for Her benefit and for the benefit of the creditors of any estate which may come into his possession under this Act; and in case any such assignee fails to pay over the moneys received by him or to account for the estate, or any part thereof, the amount for which such assignee may be in default may be recovered from his sureties by Her Majesty or by the creditors

or subsequent assignee entitled to the same, by adopting, in the several Provinces, such proceedings as are required to recover from the sureties of a sheriff or other public officer : provided always that when any person appointed assignee or joint assignee under the provisions of the twenty-seventh section has given the security for the due fulfilment and discharge of his duties required by the preceding part of this section, then any person who has become surety in that behalf, when no longer disposed to continue his suretyship, may give notice thereof in writing to his principal and also to the Secretary of State of Canada, and all accruing responsibility on the part of such person as such surety shall cease at the expiration of three months from the receipt of the last of such notices or upon the acceptance by the Crown, of the security of another surety whichever shall first happen, and the principal shall within one month from the receipt of the last of such notices give the security of another surety, but if it appears to the Governor in Council that the period so limited for giving the security of a new surety is, for any reason, insufficient the Governor in Council may allow such further period for giving the security of such new surety as appears to him proper, but such extended period shall in no case exceed two months beyond the one month within which such new security is required to be given as above-mentioned ; and this proviso shall apply to the case of any new security which may from time to time be given (40 Vict. s. 8.) ;

a. The official assignee may also be required to give, in any case of insolvency, such further security as, on petition of a creditor, the court or judge may order, such additional security being for the special benefit of the creditors of the estate for which the same shall have been given ;

b. The official assignee shall be an officer of the Court having jurisdiction in the county or district for which he is appointed. He shall as such be subject to its summary jurisdiction and to the summary jurisdiction of a judge thereof, and be accountable for the moneys, property and estates coming into his possession as such assignee, in the same manner as sheriffs and other officers of the court are.

c. No assignee shall directly or indirectly, at any time, advance or lend to any creditor any money, or become liable for any creditor to any other person, for any money upon the security or collateral security of such creditor's claim against the estate, or of any dividend declared or to be declared thereon, or of any security held by or for such creditor upon any part of the estate.

d. Every official assignee shall print, and cause to be posted up in a conspicuous place in his office ; sections thirty-two, forty-three, and forty-five of the said Act, as amended, and at every meeting of creditors a printed copy of the said sections shall be laid upon the table.

e. If it appears to the Court or judge, that an official assignee has been guilty of any fraud, breach of duty, or wilful violation of any of the provisions of the Insolvent Act of 1875, or the amending Acts, or has inserted any improper charge in any account or claim preferred by him against the estate,

the Court or judge shall forthwith make a report of the facts to the Secretary of State of Canada for the information of the Governor.

f. The assignee shall, within the first five<sup>a</sup> days of each calendar month, file in the office of the Clerk of the Court a statement of the receipts and disbursements of the estate during the last preceding month, showing also the balance of cash then in bank (40 Vict. ss. 33, 34, 35, and 37).

The additional security which may be called for under (α), is for the benefit of the creditors of the estate, in which the creditor applying for the security is interested. The other security seems to be general. The Court of Chancery will interfere, to prevent any obstruction of the assignee, in the course of his official duty. Thus where V. and D., traders, made an assignment in insolvency to the plaintiff, on the 9th of January, 1865, and in pursuance of the provisions of the Act of 1864. A judgment at law having been obtained against V., his interest in the partnership assets was sold for a nominal consideration to C., who had notice of the insolvency proceedings, and was also informed that the partnership estate was insolvent. C. then entered into possession of, and otherwise interfered with, the partnership goods, so as to hinder the plaintiff from exercising the duties of his office. The purchase was not *bona fide*, and C.'s conduct appeared to have been either wholly vexatious, or pursued in order to coerce the assignee into a settlement of the defendant's claims. An injunction was granted, on the application of the assignee, to restrain the defendant from further interference (*Wilson v. Corby*, 11 Grant, 92).

The assignee being amenable to the summary jurisdiction of the Court, he may be ordered to refund any money paid to him through a mistake (ex-parte *James*, L. R. 9 Ch. App. 609). But the assignee will not be liable to make good moneys *bona fide* applied by him under a mistake (ex-parte *Ogle*, L. R. 8 Ch. App. 711). He will, however, be liable to pay personally any costs of litigation ordered to be paid by him, and which the assets are insufficient to pay (ex-parte *Angerstein*, L. R. 9 Ch. App. 479). But an assignee cannot be compelled to appear before the superior court to declare what moneys he has in his hands belonging

to the defendant in a *saisie arrêt* after judgment (*Grone v. Lebeau*, 20 L. C. J. 30).

The 51st section of the Act of 1869 provided that an assignee removed should, nevertheless, remain liable to the summary jurisdiction of the Court and of the judge thereof, until he should have fully accounted for his acts and his conduct while he continued to be assignee. No doubt a removed assignee would still be liable under this clause for any misconduct while in office.

The latter part of the 51st section of the Act of 1869 gave the same full and summary power over a removed as over an existing assignee as to all his duties. The expression in the clause, "fully accounted," was not limited merely to the rendering of an account, but necessarily meant accounting and paying over; and it was held that as there was the same authority over a removed as an existing assignee, the former might be compelled, by an application to the judge, under the section, to pay over all moneys shown to be in his hands belonging to the estate, for until he had done so he had not, in the words of the statute, "fully accounted for his acts and conduct." The assignee is bound, as one of his duties, not to retain any money in his hands as his remuneration, to which by law he is not entitled, and the creditors can, by an application under the section, compel him either to account therefor to the estate, or to pay the same into the bank, as directed by the Statute, in the name of the estate, or apply it, with any other moneys, towards payment of a dividend (re *Botsford*, 22 C.P.U.C. 65).

The duties of the assignee are to conform himself to the law, and in the case of a removed, as well as that of an existing, assignee, the judge has power to audit his account and fix the amount of his remuneration.

29. The creditors, at their first meeting or at any subsequent meeting called for that purpose, may appoint an assignee, who shall give security to Her Majesty in manner, form and effect as provided in the next preceding section, for the due performance of his duties to such an amount as may be fixed by the creditors at such meeting. In default of such appointment the official assignee shall remain the assignee of the estate, and shall have and exercise all the powers vested by this Act in the assignee. The creditors

may also, at any meeting called for that purpose, remove any assignee, and appoint another in his stead. A certified copy of any resolution of the creditors appointing an assignee shall be transmitted in every case to the clerk of the court wherein the proceedings are pending, to remain of record in his office.

No creditor shall vote at any meeting unless present personally or represented by some person having a written authority, to be filed with the assignee, to act at any or all such meetings on his behalf, and no more than one person shall vote as a creditor on any claim for the same debt; persons purchasing claims against an estate after insolvency, shall not be entitled to vote in respect of such claims, but shall, in all other respects, have the same rights as other creditors; and no claim after being proved shall be divided and transferred to another person or party to increase the number of votes at any meeting: each claim shall continue to have one vote only in number.

It will be observed that the 28th section requires an official assignee on being appointed by the Governor in Council, and before acting, to give security for the benefit of the creditors generally. He is also, under section 28(a), on assuming the management of any estate, liable to give such further security as, on the petition of a creditor of that estate, the judge may order. Under this section, the assignee appointed at the first meeting of creditors must give security to such an amount as may be fixed by the creditors at the meeting.

It would seem that if the creditors' assignee is also an assignee appointed by the Governor in Council, and has already given security under section 28, he is not bound to give fresh security under this section, though he may be called upon to increase it. But if he has not given security when chosen assignee by the creditors, this section compels him to do so to such an amount as the creditors may then fix.

It seems intended chiefly to meet the case of the creditors' assignee not being an official assignee, and not having already given security to the Crown (see also *Churcher v. Cousins*, 28 Q.B.U.C. 540).

a. All securities given or to be given under the 28th and 29th sections of the said Act shall be deposited with the judge, and kept as part of the records of the Court, subject to the right of any person entitled to sue upon any such security to such production and delivery thereof as may be necessary in order to the exercise of such right.

b. Any creditor of the estate may, in the case of any person required under the said 28th and 29th sections to give security, have inspection of such security, and may, if in his opinion the surety or sureties in such security are insufficient, apply, on notice to the judge, for an order that new or additional sureties be furnished, and the judge may, upon such application, make such order as shall seem reasonable, both as to the furnishing of sureties and as to the costs of the application (39 Vict. chap. 30, ss. 6 and 7).

In reference to the meaning of the words, "in default of such appointment," the cases have not been uniform. In a case in Quebec, at the first meeting of creditors under the Act of 1869, the majority in value voted that one S. should be assignee, while the majority in number voted that one G. should be assignee. A reference, under the 118th section of the Act, was made to the judge under the above state of facts, and it was held that there was a failure of election of assignee, and that the interim assignee, under the 6th section, became assignee (re *Marstiss*, 3 *Revue Critique*, 136). But in Ontario, in a county court case, it was laid down that the words "default of appointment," in this section, do not refer to a case where the creditors attend the first meeting, and the majority in number vote for one assignee, and the majority in value vote for another. That, in such case, there is really an election, and the judge, under the 102nd section of the Act, must decide who is the assignee (re *Harris*, 12 C. L. J. N. S. 251). In both the cases referred to, the matter was brought before the judge for decision, under the above section of the Act. The writer is of opinion that re *Marstiss* is not sound, for the matter having come before the judge, he had the power of determining the appointment. But if the matter were not brought before the judge, and it would not be unless some party moved in the matter, there would surely be a default of appointment. Re *Harris* seems to be correctly decided on the facts, though the language used would lead to the conclusion that if the matter was not brought before the judge there would be an election. If a meeting were called, but the creditors entitled to appoint an assignee did not attend, or attending did not make an appointment not seeing fit to do so, there would be a default (re *Harris*, 12 C. L. J. N. S. 25; *McDonald, J. J.*, Bump, on Bankruptcy, 9th Ed. 472; see 40 Vict. s. 23).



In re *Harris*, supra, it was held, also, that the assignee appointed under this section need not be an official assignee or a resident of the county; and the Act would seem to show that this is the case, though the writ of attachment must in the first instance be directed to an official assignee, or the assignment made to such assignee (see section 2 (a)).

Where the character or capacity of the assignee is called in question, it will be sufficient to show that he duly became the official assignee of the estate; for by this section, in default of appointment by the creditors, the official assignee becomes the assignee of the estate; and the assignee, if there is any defect in his election, may rely upon his position of assignee by operation of law (*Marsh v. Sweeny*, 2 Pugsley, 454).

It is apprehended, however, that after proof of the party being official assignee, it would be necessary to show that the circumstances under which the latter becomes assignee had occurred. The 144th section of this Act, contains provisions as to the method by which the appointment of an assignee may be proved. When a party has proved his claim on a composition deed, and has also obtained an order to set aside the insolvent's discharge, with costs to be paid to him out of the estate, he is precluded from objecting that the assignee is not duly appointed (*Allan v. Garratt*, 30 Q.B. U. C. 165).

When an action is brought by an assignee as such, on a plea denying that the plaintiff is assignee, he would be compelled to prove the necessary preliminary proceedings which conferred upon him the office of assignee, and among them, that the person of whose estate he claimed to be assignee, was a trader, subject to the provisions of the Act (*Groves v. McArdle*, 33 Q. B. U. C. 252; *Butler v. Hobson*, 4 Bing. N. C. 29 ).

The Act of 1869, section 144, provided as to the appointment of an assignee, and proceedings preliminary to such appointment; that after the expiration of a year, as to all persons not previously contesting the appointment or preliminary proceedings, the same should be conclusively presumed to be valid. It was held that the section could not apply to persons, such as debtors of the insolvent, who could not contest such proceedings, and that a debtor

of the insolvent, might, when sued by the assignee, set up that the insolvent was not a trader, though there had been a full adjudication on this point in the Insolvent Court (*Groves v. McArdle*, 33 Q. B. U. C. 252).

It seemed to be the opinion of the Court in *Newton v. Ontario Bank* (15 Grant 283), that, if an assignment were *bona fide* made to an official assignee, who had not been duly appointed, the creditors might take advantage of the irregularity of the appointment, but that, if they accepted and acted on the assignment, the insolvent could not impeach the appointment, the making of the assignment being his own voluntary act, nor could persons claiming adversely to the creditors, raise the objection (see *Groves v. McArdle*, *supra*).

A person claiming, as agent or attorney, to represent a creditor, at the first meeting called for the choice of an assignee, must have authority from the creditor, by a duly authenticated letter of attorney, and such authority must be filed, before the party is entitled to vote (re *Campbell*, 1 U. C. L. J. N. S. 135). The creditors present may, however, if they choose, waive the objection.

At a meeting of creditors, held for the purpose of giving their advice upon the appointment of an official assignee, it was held, that the creditors of the individual partners had the right, as well as the creditors of the firm, to vote in the choice of an assignee (*Luxton v. Hamilton*, 10 U. C. L. J. 334).

Under "The Interpretation Act" (31 Vict. chap. 1, s. 7), "Twenty-seventhly: Words authorizing the appointment of any public officer or functionary, or any deputy, shall include the power of removing him, reappointing him, or appointing another in his stead, in the discretion of the authority in whom the power of appointment is vested.

"Twenty-eighthly: Words directing or empowering a public officer or functionary to do any act or thing, or otherwise, applying to him, by his name of office, shall include his successors in such office, and his or their lawful deputy.

"Twenty-ninthly: All officers now appointed, or hereafter, to be appointed by the Governor-General, whether by commission or

otherwise, shall remain in office during pleasure only, unless otherwise expressed in their commissions or appointments."

The Act gives express power to remove the assignee at any meeting called for that purpose. This meeting would, no doubt, require to be called in the manner prescribed by section 101 of the Act.

It was held that a removal of an assignee, at a meeting of creditors, called under section 11, sub-section 3, of the Act of 1864, had the effect of removing, with respect to the separate as well as the joint estates, in the case of an assignment by a copartnership; though the assignee removed, claimed under a subsequent assignment, from one partner individually (re *Macfarlane*, 12 L. C. J. 239).

An assignee is not appointed simply for his own profit, but as trustee for the creditors, and he is bound to exercise due diligence in collecting and disposing of the property of the insolvent, and in distributing the proceeds among the creditors. If he is guilty of gross and culpable neglect of duty in this respect, he may be removed (re *Morse*, 7 B. R. 56); and when the assignee is removed for misconduct, he may be compelled to pay the costs of the proceedings for his removal (ib).

No particular mode or manner of voting is prescribed by the Act. It may be assumed, therefore, that any mode or manner of voting by which the choice of each creditor entitled to vote, is clearly expressed, is sufficient. It may, no doubt, be taken by ballot, or *viva voce*. It may be taken by calling the name of each creditor, or by calling upon the person or persons representing creditors, by power of attorney, to name the choice of the creditor or creditors represented by him. The latter mode cannot be recommended as the most approved mode; but can hardly be said to be incompetent or irregular, so long as it clearly appears that the choice of each creditor, who has proved his claim, is thereby clearly expressed (re *Lake Superior C. R. & I. Co.*, 7 B. R. 376).

In England at the first meeting for the appointment of a trustee, the practice, where the registrar or chairman is in doubt as to the right of a creditor to vote, is to allow the vote and state the objection on the back of the proof (re *Hoare*, L. R. 18 Eq., 705).

It has also been held that if a creditor having a clear right of proof be excluded from voting in the appointment of a trustee by reason that his proof is rejected, and the proof be afterwards sustained, the Court will vacate the appointment so made and order a new choice (ex parte *Crowther*, 24 L. T. N. S. 330).

There is no doubt that, at this meeting, any creditor who desires to take part in the proceedings must prove his claim.

No creditor has any right to be heard either in person or by attorney upon any part of the proceedings until he has proved his claim (re *Hill*, 1 B. R. 16 ; re *Jones*, 2 B. R. 59).

Proof means not merely making affidavit in the form prescribed by the Act, but also filing the affidavit (see also *Rooney v. Lyon*, Q. B. U. C. 1876).

A creditor, who retains the affidavit in his own possession, is not a creditor who has proved his debt within the technical meaning of those terms in the Act (re *Sheppard*, 1 B. R. 439).

A creditor, holding security, cannot vote for an assignee (re *Davis*, 1 B. R. 120 ; re *Parkes*, 10 B. R. 82).

But if the balance of his claim, after deduction of the value of the security, exceeds one hundred dollars, there seems no objection to the vote on proof of the claim.

The security must be upon the property of the insolvent, otherwise he may prove the full amount of his claim and vote (re *Cram*, 1 B. R. 504). Where a creditor has two claims, one of which is unsecured and the other secured, he may prove the former and vote (re *Parkes*, 10 B. R. 82).

In order to vote for an assignee, the attorney must be an attorney in fact, and must be appointed by a power of an attorney (re *Purvis*, 1 B. R. 163).

One member of a firm may execute a power of attorney authorizing a person to vote for assignee, in the name of the firm, and bind all the other members thereby (re *Barrett*, 2 B. R. 533).

When an agent executes a power of attorney in the name of the principal, he must produce legal evidence, that he is duly authorized to execute the power of attorney (re *Knolpfel*, 1 B. R. 23).

Where the authority is joint, it must be exercised by all to whom it is given (re *Phelps*, 1 B. R. 525).

When a letter of an attorney addressed to a firm does not authorize either of partners to act separately, one partner cannot act alone and without the co-operation of his co-partner (re *Frank*, 5 B. R. 194).

A power of attorney, not containing a power of substitution, does not confer any authority upon any other than the person duly constituted agent thereby, to act for the creditor, nor can any one else sign the name of such agent to a paper on behalf of the creditor (re *Palmer*, 3 B. R. 301).

The Act nowhere directs, nor does it seem to contemplate a postponement of the vote for assignee where some creditors have proven their debts in order to enable others to do so; on the contrary, it seems to contemplate the utmost practicable expedition in choosing the assignee, and for a very good reason, because, until there is an assignee there is no one to represent or whose official duty it is to look after the interests of the estate. The creditors, who have proved their claims and are entitled to vote for assignee, may no doubt consent if they see fit, to wait for others to prove before proceeding to choose the assignee. It is, however, optional with them. But even this power should be exercised sparingly, and the vote ought always to be taken at the earliest practicable moment (re *Lake Superior C. R. & I. Co.* 7 B. R. 376; re *Northern Iron Co.* 13 B. R. 356).

Where, at the first meeting of the creditors, only one creditor appears and proves his debt and there are no other debts proven, the right to choose an assignee belongs to this sole creditor who has proved his claim (re *Haynes*, 2 B. R. 227).

It is the policy of the Act to give the creditors of the insolvent the choice, in the first instance, of the person who is to take the assets and manage them. It is only when the creditors fail to elect, that the official assignee becomes the assignee of the estate (re *Smith*, 1 B. R. 243; re *Scheiffer*, 2 B. R. 591).

An assignee should be appointed, even though no debts have been proved (re *Cogswell*, 1 B. R. 62). So an assignee should be appointed, even though there are no apparent assets, for he is designed by the Statute to act as a trustee on behalf of the creditors,

and it is his duty to search out and collect every species of property belonging to the insolvent (re *Graves*, 5 Law Rep. 25).

The Act does not allow a party to vote in respect of a claim purchased after the insolvency. It would seem that the vendor under such circumstances could not vote. The act contemplates claims owned by the persons who seek to vote. When a creditor sells or assigns his debt after it has been proved he has no further business in Court, although the proceedings must be carried on in his name. The actual owner and assignee must control the debt and receive the dividend. Where several claims have been assigned to one person, he has but one vote (re *Frank*, 5 B. R. 194).

If a purchaser *bona fide* buys a claim against the debtor, he may prove for the full amount, although he paid a less sum therefor. At least, this is the law in reference to bills or notes of the debtor (ex-parte *Lee*, 1 P. W. 782). It is immaterial, for this purpose, that the bills or notes were bought in after the insolvency of the party against whose estate proof is made, if at the time of the insolvency they were in the hands of persons entitled to prove them (ex-parte *Rogers*, Buck. 490). If, however, the purchaser has notice or reason to suspect that the bills were, as between the drawer and acceptor, issued fraudulently, for the purpose of raising money on the eve of insolvency to the detriment of the general creditors, he will not be allowed to prove for more than he gave for the bills (ex-parte *Gordon*, L. R. 1 Ch. D. 187; Robson, 3rd Ed. 225).

30. As soon as the security required from the assignee appointed by the creditors shall have been furnished by him, or if no security be required then immediately on his appointment, it shall be the duty of the official assignee to account to him for all the estate and property of the insolvent which has come into his possession, and to pay over and to deliver to him all such estate and property, including all sums of money, books, bills, notes and documents whatsoever belonging to the estate, and to execute in his favour a deed of assignment in the Form H.

The 40th Vict. s. 9, amended this section, by adding, after the word "him," in the second line, the words, "or if no security be required then immediately upon his appointment." As we have already seen, it is necessary that this Form H should be strictly

followed in the transfer from the official to the creditors' assignee, as it derives its efficacy solely from the Statute. There seems to be no obligation on the official assignee to make the transfer until the security is perfected, when security is required.

31. Every assignee, on his becoming such, shall give notice of his appointment as such by advertisement, to be inserted once in the Official Gazette, in the Form I., and by a copy thereof sent to each creditor by post and post-paid.

The 40th Vict. s. 10, amended this section, by adding, after the word "advertisement," in the second line, the words "to be inserted once in the Official Gazette."

It has been held in the United States that the publication by the assignee of his appointment is not essential to the regularity of the proceedings. This provision of the Act is merely directory to the assignee, and not intended so much for creditors as for persons owing debts to or otherwise having business with the estate (re *Littlefield*, 3 B. R. 57).

The Statute on which this decision was rendered provides "that the assignee shall immediately give notice of his appointment by publication," &c. (see notes to section 11).

32. No person shall act as the attorney or agent of any creditor upon any question as to the appointment of such person as assignee, or in reference to any claim or demand of such creditor on an insolvent estate of which such person is the assignee, nor shall any partner or employee of any person act as the attorney or agent of any creditor in any matter in which under this section such person himself could not act, nor shall any assignee employ any person, being his partner, as counsel, advocate, attorney, solicitor, or agent for such assignee in the respect of the insolvent estate.

This section is now substituted in lieu of the thirty-second section of the Act of 1875 by the 40th Vict. s. 11.

33. An assignee may, however, on being authorised by the judge, act as the attorney or agent of a creditor when the action to be taken is in the interest of the estate or of the creditors generally.

34. The creditors may, from time to time, at any meeting, determine where subsequent meetings shall be held; and until they shall have passed a resolution to that effect all meetings of the creditors shall be held at the office of the assignee, unless otherwise ordered by the judge.

35. The creditors, at any meeting, may appoint one or more inspectors, who shall superintend and direct the proceedings of the assignee in the management and winding up of the estate ; and they may also, at any subsequent meeting held for that purpose, revoke the appointment of any or all the said inspectors ; and upon such revocation, or in case of death, resignation, or absence from the Province of such inspectors, may appoint others in their stead ; and such inspectors may be paid such remuneration as the creditors may determine ; and whenever anything is allowed or directed to be done by the inspectors, it may or shall be done by the sole inspector, if only one has been appointed. But no assignee or inspector of any insolvent estate shall purchase directly or indirectly any part of the stock in trade, debts or assets of any description, of such insolvent estate, or any claim against such estate, nor shall any assignee employ any inspector, nor shall any inspector employ any person being his partner, or being the partner of any assignee, or the partner of any inspector as counsel, advocate, attorney, solicitor, or agent in respect of the insolvent estate (40 Vict. s. 12).

The 39th Vict. (chap. 30, s. 8) amended this section by striking out the word "as" between the words "assignee" and "inspector" in the fourth line from the end, and inserting in lieu thereof the word "or."

An inspector stands in very much the same position as the debtor would have done if no assignment had been made. Where the plaintiff, as assignee of the estate of an insolvent, brought replevin, the writ being directed to and served by the sheriff, who was also an inspector to the estate, it was held that the sheriff as inspector was interested in the suit, and the writ of replevin was set aside (*Fairweather v. Nevers*, 11 C. L. J. N. S. 258 ; 2 Pugsley, 524.)

It does not seem necessary that the inspector shall be a creditor on the estate though creditors are usually appointed to this position.

In England, in cases where there is a conflict of interest between the joint and separate creditors of an insolvent, an inspector has been appointed to protect the interests of the separate creditors. One of three partners was separately adjudicated a bankrupt under the Act of 1861. Joint creditors of the firm proved debts amounting to £89,000, and two of the joint creditors were appointed creditors' assignees. The separate debts amounted to not more than £8,000. There was no joint estate, and the separate



estate only amounted to £3,850. On the application of almost all the separate creditors that the separate creditors might be at liberty to appoint an inspector of the separate estate to protect their interests the application was granted upon the condition that the inspector should take no step without the approval of the registrar (ex parte *Melbourn*, 25 L. T. N. S. 368; L. R. 6 Ch. App. 64,835).

36. The creditors may, at any meeting, pass any resolution or order directing the assignee how to dispose of the estate, real or personal, of the insolvent; and, in default of their doing so, the assignee shall be subject to the directions, orders and instructions he may, from time to time, receive from the inspectors, with regard to the mode, terms and conditions on which he may dispose of the whole or any part of the estate, subject to the proviso as to sale *en bloc* contained in the thirty-eight section of this Act.

The 39 Vict. chap. 30. s. 9, amended this section by adding the following words "subject to the proviso as to sale *en bloc* contained in the thirty-eighth section of this Act." It therefore appears that no sale of the estate *en bloc* can take place without the sanction of the creditors given at a meeting called specially for the purpose of considering such sale. It will be observed that the 67th section of the Act requires debts to be sold by public auction.

37. Any one or more creditors, whose claims in the aggregate exceed five hundred dollars, who may be dissatisfied with the resolutions adopted or orders made by the creditors or the inspectors, or with any action of the assignee for the disposal of the estate or any part thereof, or for postponing the disposal of the same, or with reference to any matter connected with the management or winding up of the estate, may, within twenty-four hours thereafter, give to the assignee notice that he or they will apply to the Court or judge on the day and at the hour fixed in such notice, and not being later than forty-eight hours after such notice shall have been given, or as soon thereafter as the parties may be heard before such Court or judge, to rescind such resolutions or orders. And it shall be lawful for the Court or judge, after hearing the inspectors, the assignee, and creditors present at the time and place so fixed, to approve, rescind, or modify the said resolutions or orders. In case of the application being refused the party applying shall pay all costs occasioned thereby, otherwise the costs and the expenses shall be at the discretion of the judge.

It would be necessary for the creditor to prove his claim before applying under this section. When can the resolutions be considered as adopted, or orders made within this section? When actually recorded, or when the creditor receives notice thereof? What length of notice is required? The appointment is to be not later than forty-eight hours *after* such notice shall have been given, but the Act does not say how long before the appointment must the notice be served.

38. The assignee shall exercise all the rights and powers of the insolvent in reference to his property and estate. And he shall wind up the estate of the insolvent by the sale in the ordinary mode in which such sales are made, of all bank or other stocks, and of all movable property belonging to him, by the collection of all debts or by the sale of the estate of the insolvent, or any part thereof, if such be found more advantageous, at such price and on such terms as to the payment thereof as may seem most advantageous :

Provided that no sale of the estate *en bloc* shall be made without the previous sanction of the creditors given at a meeting called for that purpose ; and provided also that no such sale shall affect, diminish, impair, or postpone the payment of any mortgage or privileged claim on the estate, or property of the insolvent, or on any portion thereof.

(2.) It shall not be necessary to advertise under the provisions of the seventy-fifth section of this Act any proposed sale of the estate *en bloc* under this section, although the estate may comprise real estate (39 Vict. chap. 30, s. 10).

Where both partnership property and individual property of the members of the firm passes under the assignment or the writ of attachment, a sale of the whole partnership property, independently of the individual property of the members of the firm will be a sale *en bloc*, within this section, and will require the previous sanction of the creditors to give it validity (re *McLaren and Chalmers*, 1 Appeal Reports, Ont. 68).

It would seem, also, that a sale of the entire separate property would be a sale *en bloc*.

At a meeting of creditors, called for the purpose of disposing of the entire estate and effects of the insolvent *en bloc*, the creditors are not bound to accept the highest tender for the estate, but may, in their discretion, accept the lowest if it is more satisfactory, as being accompanied with security. A judge in in-

solvency will not interfere to rescind such a decision made by the majority of the creditors at a meeting called for the purpose, legally held, unless fraud be proven (*Lafoie v. Hudon*, 18 L. C. J. 139).

39. The assignee, in his own name as such, shall have the exclusive right to sue for the recovery of all debts due to or claimed by the insolvent of every kind and nature whatsoever ; for rescinding agreements, deeds and instruments made in fraud of creditors, and for the recovery back of moneys alleged to have been paid in fraud of creditors, and to take, both in the prosecution and defence of all suits, all the proceedings that the insolvent might have taken for the benefit of the estate, or that any creditor might have taken for the benefit of the creditors generally ; and may intervene and represent the insolvent in all suits or proceedings by or against him, which are pending at the time of his appointment, and on his application may have his name inserted therein in the place of that of the insolvent : and, if after an assignment has been made, or a writ of attachment has issued under this Act, and before he has obtained his discharge under this Act, the insolvent sues out any writ, or institutes, or continues any proceeding of any kind or nature whatsoever, he shall give to the opposite party such security for costs as shall be ordered by the Court before which such suit or proceeding is pending, before such party shall be bound to appear, or plead to the same, or take any further proceeding therein.

*Section 125. as to claims against assignee -*

This section only applies to an assignee under the Insolvent Act, and an assignee under an assignment to him by an insolvent, for the general benefit of his creditors, not made under the provisions of the Act, is not entitled to sue in his own name for anything connected with such assignment (*Prevost v. Drolet*, 18 L. C. J. 300).

The assignment, under the Act of 1864, was held to suspend lawsuits pending by or against the insolvent. After assignment, the assignee may move in any suit for the suspension of the proceedings until after he can formally appear therein to prosecute or defend it in his official capacity (*Burland v. Larocque*, 12 L. C. J. 292).

But the assignment does not deprive the insolvent of all right of action. Where a party has properly brought an action in his own name, before the appointment of an assignee in insolvency, he may continue it in his own name, so long as the assignee does

not intervene, and desire his name to be inserted as plaintiff. When the action, after the appointment of an assignee is continued in the insolvent's name, for the benefit of the creditors, and they give security for the costs, if a plea is pleaded to the further maintenance of the action, setting up the plaintiff's insolvency, and consequent vesting of the right of action in the assignee, the proper replication for the plaintiff is, that the action was continued for the benefit of the creditors after the appointment of the assignee, instead of alleging that the action was so brought (*Dunn v. Irwin*, 25 C. P. U. C. 111).

It would seem that this section does not oblige the assignee to intervene in pending suits. It only becomes a duty for an assignee to prosecute a suit when the interest of the estate demands it, of which the assignee is in the first instance the judge (*Reave v. Waterhouse*, 10 B. R. 277).

Neither the insolvent nor his attorney has the authority to settle a suit in the name of the insolvent, after the commencement of the proceedings in insolvency (*Home Ins. Co. v. Hollis*, 14 B. R. 337).

An insolvent cannot represent his creditors, who must be represented by the assignee, and therefore, as a general rule, an insolvent cannot maintain a suit in respect of property vested in his assignee under the insolvency proceedings (*Payne v. Dicker*, L. R. 6 Ch. App. 578); neither can an insolvent maintain a suit against his assignee and an alleged debtor to his estate, on the ground of fraud and collusion (*Motion v. Moojen*, L. R. 14 Eq. 202); and a bankrupt who has not obtained his discharge cannot, except perhaps in the case of after acquired property, where the trustee has not interfered, and in the cases where the right of action does not vest in the trustee, bring an action or suit in equity and this, although the bill charges fraud against all the defendants, including among them the trustee (*Motion v. Moojen*, L. R. 14 Eq. 202; *Payne v. Dicker*, 24 L. T. N. S. 492).

An insolvent cannot be joined as co-plaintiff with his assignee in a suit in equity (*Johnson v. Montreal I. Ry. Co.*, 22 Grant, 290; see *Bennett v. Gamgee*, L. R. 2 C. P. D. 11).

There is nothing in the Insolvent Act to take away the right

if a creditor to sue his debtor, who may have made an assignment of his property under the Act. The mere assignment would form no defence to such a suit until the debtor obtained his final discharge, and a debtor who is arrested in a *capias ad respondendum* after assignment, by a creditor who has proved on his estate, has no remedy but an application to the Judge in Insolvency for discharge from custody under the 127th section of the Act (*Hegan v. Jones*, 2 Pugsley, 290).

It has been held, in the Province of Quebec, that a *capias ad respondendum* may issue against a debtor after he has made an assignment under the Insolvent Act (*Beaudin v. Roy* 20 L. C. J. 308 ; 5 Revue Legale, 232); or that such writ may issue concurrently with the assignment (*Stevenson v. McOwan* 3 L. C. L. J. 38). There is certainly nothing in the Statute to prevent the issue of such writ, and if, at the meeting of his creditors, or at any time afterwards, it appears that the insolvent has been guilty of fraud, it is important that the creditors should have the power to arrest him in the event of his threatening to go beyond the jurisdiction of the Court (see also *Robertson v. Hale*, 21 L. C. J. 38). In *Thomas v. Hall* (6 P. R. U. C. 172), a summons obtained by a debtor to set aside a writ of *capias ad satisfaciendum*, issued against him after his assignment under the Insolvent Act of 1869, was discharged with costs, the evidence satisfying the Court that the assignment was not executed *bona fide*, but was a fraudulent device contrived for the express purpose of defeating the plaintiff's recovery, by fraudulent abuse of the provisions of the Act (see also *Gault v. Lagarde*, Wotherspoon's Ins. Act, 194-5).

When a creditor brings an action at law against his debtor, and afterwards sues out a writ of attachment in insolvency, and the proceedings against the debtor are pending at the same time, proper course for the latter is to contest the claim of the creditor in insolvency, or to apply to the Court in which the action is brought to stay the proceedings in the action. The pendency of the insolvency proceedings cannot, in the action at law, be set up by the debtor as an absolute bar to the further maintenance of the action (*Baldwin v. Peterman*, 2 U. C. L. J. N. S. 128 ; P. U. C. 310).

The mere issuing of the attachment is not an absolute bar to the action, for the attachment may be set aside (*ib.*).

There is nothing in this section, or elsewhere in the Act, to fix the time within which actions by the assignee must be brought. The Statutes of Limitation affect the remedy only, and as to this the law of the place where the remedy is sought prevails. It is presumed, therefore, that the assignee is bound by the Statute of Limitations, and that, in each Province, he would be required to commence proceedings within the time fixed by the laws of that Province for instituting the particular kind of action. It may be useful, therefore, to consider when the cause of action accrues to the assignee. In the United States it has been held that the cause of action accrues on the execution of the assignment, and the limitation begins to run from that time (*Lathrop v. Drake*, 30 Leg. Int. 141).

This is the rule as to all matured claims and demands. On all others the Statute runs from their maturity, or from the time when an action will lie, and he must sue from these dates respectively (*Norton v. De la Villebeuve*, 13 B. R. 374).

In the United States it is held that the plaintiff must prove himself to be the duly appointed assignee by producing a certified copy of the record or of the assignment (*re McIver*, 1 Cranch, C. C. 90).

But if the insolvency is expressly admitted, and the right of the assignee to sue is not put in issue by any of the pleas, it is not incumbent on the assignee to prove the assignment (*Zuntzinger v. Ribble*, 4 B. R. 724).

The 144th section of this Act contains provisions as to proof of the appointment of the assignee, and of the regularity of all proceedings at the time thereof and antecedent thereto (see notes to this section).

An assignment by a bankrupt vests the estate in the assignees, who may bring an action thereon in their own name without notice. No notice of assignment is necessary when the debt remains due, and is not attached by the other creditors, even on the common assignment (*Gates v. Another*, 1 Revue Critique, 481).

The assignee can only, under this section, sue for the property

or rights of action which pass to him as assignee, and can only prosecute actions of a like character in his own name (*Noonan v. Orton*, 12 B. R. 405), and though this section is worded so as to confer an extensive power, it is limited by section 16 to such interests as pass to the assignee. After the execution of a deed of assignment or the issue of a writ of attachment, the insolvent is entirely divested of his property and the same is vested in the assignee. There is no residuary interest in the insolvent. It results as a necessary legal consequence that the assignee may and can alone maintain ejectment (*Burstow v. Adams*, 2 Day, 70). A right of action against a sheriff for negligence in the levy of an execution, whereby the claim was lost, vests in the assignee of the judgment creditor (*Sullivan v. Bridge*, 1 Mass. 511).

An assignee may maintain an action to set aside fraudulent conveyances made by the debtor, before he was adjudged insolvent (*Bradshaw v. Klein*, 1 B. R. 542). After the commencement of proceedings in insolvency, no one but the assignee can bring or maintain an action to set aside a fraudulent conveyance made by the insolvent (re *Meyers*, 1 B. R. 581; *Allen v. Montgomery*, 10 B. R. 503; *Thurmond v. Andrews*, 13 B. R. 157).

If one partner fraudulently indorses bills in the name of the firm to secure his private debt, the firm will not be bound if the indorsee was cognizant of the fraud, and, in the event of the insolvency of the delinquent partner, the assignee under the insolvency and the solvent partner may bring an action against the indorsee to recover such bills or the proceeds of them (*Heilbut v. Nevill*, L. R. 4 C. P. 354).

An assignee in insolvency sued in trover for the conversion of goods in taking possession of same, as such assignee cannot set up that the insolvent became entitled to them under a sale which may have been an act of bankruptcy (*McKenzie v. Davidson*, 27 C. P. U. C. 188).

Where there was a fraudulent sale by the insolvent of all his property, less than three months before the assignment, and, on the assignee being appointed, he took possession of the property, and advertised it for sale, but opposition was made by the person to whom the insolvent sold, and large expenses were thereby in-

curring by the assignee for insurance, advertising, law costs, guardian and watchman's fees in preserving the property, it was held that the assignee, in establishing his right to the property, might maintain an action against the person to whom it was sold for the loss occasioned to the estate, and that it was not necessary that the assignee should be specially authorized to bring such action by the creditors holding hypothecary claims on the real estate (*Brown v. Smith*, 13 L. C. J. 288).

The assignee cannot avoid a transaction of which he has taken the benefit, thus he cannot, having received the proceeds of a sale, afterwards treat that sale as tortious, and sue the seller in trover (*Smith v. Baker*, L. R. 8 C. P. 356; *Brewer v. Sparrow*, 7 B. & C. 310).

The words "opposite party," in this section, are used to designate all against whom the insolvent, after attachment or assignment issued, or before discharge obtained, "sues out any writ, or institutes or continues any proceedings of any kind or nature whatsoever." These words apply to the assignee when he is made a defendant to a suit by the insolvent. Thus where the insolvent filed a bill to set aside an attachment, as fraudulently issued, and made the assignee of his estate a defendant, although no party to the alleged fraud, an order was granted under this section, requiring the plaintiff to give security for the costs of the defendant, the assignee (*Lee v. Moffatt*, 6 P. R. U. C. 284).

The Bankruptcy Act of 1869, in England (section 12), provides that when a debtor shall be adjudicated a bankrupt, no creditor to whom he is indebted, in respect of any debt provable in bankruptcy, shall have any remedy against his property or person in respect of such debt, except in the manner directed by the Act. Power is also given by the Court to restrain further proceedings in any action, suit, execution, or other legal process against the bankrupt in respect of any debt provable in bankruptcy (see the following cases under the English Act: *Ex parte Ditton*, L. R. 1 Ch. D. 557; *ex parte Roche*, L. R. 6 Ch. App. 795; *ex parte Anderson*, L. R. 5 Ch. App. 473; *ex parte Tait*, L. R. 13 Eq. 311; *re Chapman*, L. R. 15 Eq. 75; *ex parte Isaac*, L. R. 6 Ch. App. 58; *ex parte Warren*, L. R. 10 Ch. 222; *ex parte Mills*, L. R. 6



Ch. App. 594; *ex parte Hughes*, L. R. 12 Eq. 137; *ex parte Birmingham & S. G. Co.*, L. R. 11 Eq. 615: *ex parte Coker*, L. R. 10 Ch. App. 652).

40. If a partner in an unincorporated trading company or co-partnership becomes insolvent within the meaning of this Act, and an assignee is appointed to the estate of such insolvent, such partnership shall thereby be held to be dissolved; and the assignee shall have all the rights of action and remedies against the other partners in such company or co-partnership, which the said insolvent partner could have or exercise by law or in equity against his co-partners after the dissolution of the firm, and may avail himself of such rights of action and remedies, as if such co-partnership or company had expired by efflux of time.

41. Every official assignee, or assignee appointed by the creditors, shall in every case in which he acts as such, keep a register showing the name of each insolvent who has made an assignment, or against whom a writ of attachment has issued, his residence, place of business, and the nature of his trade or business, the date of the assignment, or of the issue of the writ of attachment, the amount of liabilities acknowledged by the insolvent in his schedule of liabilities, the amount of claims proved, the amount of composition, or of dividends paid—and whether a discharge has been granted within one year or not—the amount of dividends remaining unpaid after three months from the declaration of the last dividend, with such other information as the assignee may deem of general interest with reference to each estate—which register shall be open to the inspection of the public, within office hours, at the office of such assignee; and the official assignee, or the assignee, as soon as he takes charge of any estate, shall open a separate book for each such estate, showing a debtor and creditor account of all his receipts and disbursements on account thereof:

And every assignee, other than an official assignee, shall within one month after he shall have wound up the estate of any insolvent, and obtained his discharge, deposit the register kept by him as aforesaid, with reference to such estate, in the office of the official assignee of the county or district, where it shall remain for the like purposes, and under the same provisions as the register kept by the official assignee.

And every register of, or coming into possession of, an official assignee and every other record required to be kept by an official assignee in connection with the performance of his duties shall be held to be the property of Her Majesty, and upon the death of an official assignee, or his ceasing to hold office, the Judge shall be entitled to, and shall assume possession and control of such register or other record which shall thereafter be kept among the records of the Court open to inspection as aforesaid (39 Vict. chap. 30, s. 11).

Every assignee shall, before the end of October in each year, fill up and

transmit to the Minister of Agriculture, or in case this branch of the subject of statistics and the registration thereof be by the Governor in Council transferred to any other Minister, then to such other Minister a schedule showing the particulars contained in the register to be kept by him under the forty-first section of the said Act, and such other schedules for the year ending the thirtieth day of September next preceding, relative to the insolvency matters transacted by him as shall be from time to time prescribed by the Governor in Council according to forms published in the *Canada Gazette*, and it shall be the duty of every assignee to make from day to day, and to keep entries and records of the particulars to be comprised in such schedules (39 Vict. chap. 30, s. 18).

Any assignee neglecting or refusing to fill up and transmit any schedule under the eighteenth section of this Act, or wilfully making a false, partial, or incorrect schedule thereunder, shall forfeit and pay the sum of forty dollars together with full costs of suit, to be recovered by any person suing for the same, by action of debt or information in any Court of record in the Province, in which such return ought to have been made, or is made, or in the Exchequer Court of Canada, and one moiety whereof shall be paid to the party suing, and the other moiety into the hands of Her Majesty's Receiver General, to and for the public uses of Canada (39 Vict. chap. 30, s. 19).

The statistics collected by the Minister of Agriculture or such other Minister as aforesaid, under this Act, shall be abstracted and registered and the results thereof shall be printed and published in an annual report (39 Vict. chap. 30, s. 20).

The insolvent has no action against the assignee to his estate, even after his discharge, to compel him to render an account of his administration. His recourse is by petition or motion, and if he claims under deeds of composition and discharge these must have been first deposited with the assignee to enable him to give notice of the same under the Act (*Fraser v. Patterson*, 1 Revue Critique, 248).

#### ASSIGNEES' ACCOUNTS, COMMISSION, &c.

42. Every assignee, under this Act shall, within thirty days after obtaining his discharge, and every assignee under any Act hereby repealed shall within thirty days after obtaining his discharge, or the closing of his accounts as such, or within thirty days after the coming into force of this Act, if he has obtained his discharge or closed his accounts before its coming into force, pay over to the Receiver-General all moneys belonging to the estate then in his hands, not required for any purpose authorized by this Act or any Act hereby repealed, as the case may be, with a sworn statement and account of such moneys, and that they are all he has in his hands, under a penalty of

not exceeding ten dollars for each day on which he shall neglect or delay such payment ; and he shall be a debtor to Her Majesty for such moneys and may be compelled as such to account for and pay over the same.

43. The assignee shall be entitled to a commission on the net proceeds of the estate of the insolvent of every kind, of five per cent. on the amount realized not exceeding one thousand dollars, the further sum of two and a half per cent. on the amount realized in excess of one thousand dollars and not exceeding five thousand dollars, and a further sum of one and a quarter per cent. on the amount realized in excess of five thousand dollars— which said commission shall be in lieu of all fees and charges for all his services and disbursements in relation to the estate, exclusive of actual expenses in going to seize and sell, and of disbursements necessarily made in the care and removal of property :

The creditors may, in case, in their opinion, the remuneration of the assignee under the preceding part of this section is inadequate, at any meeting called for the purpose, fix such additional remuneration to be paid out of the estate to the assignee as they shall think reasonable.

No assignee shall employ any counsel or attorney-at-law without the consent of the inspectors, or of the creditors ; but expenses incurred by employing such counsel or attorney with such consent, shall be paid out of the estate, if not recovered from any party liable therefor.

The remuneration of the official assignee, when he is superseded by an assignee appointed by the creditors, and the remuneration of the assignee, whether he be the official or the creditors' assignee, in cases in which the estate is settled by composition, shall be fixed by the creditors at their first meeting or by the inspectors within one week thereafter, subject in either case to revision by the Court or judge, and in default of being so fixed shall be settled by the Court or judge, and taxed by the proper officer, and shall be the first charge on the estate.

Any assignee who shall insert any charge in his account, above or beyond the remuneration allowed to him by law, and who shall not remove it therefrom at the request in writing of any creditor, or of the inspectors, within three days after the receipt of such request, shall forfeit and pay, in case the judge shall so order, treble the amount of the overcharge to the funds of the estate (39 Vict. chap. 30, s. 12 ; 40 Vict. s. 13).

By the 40 Vict. s. 34, every official assignee is required to print this section as amended, and he must cause the same to be posted up in a conspicuous place in his office, and at every meeting of creditors a printed copy of this section must be laid on the table.

According to the reading of this section, the assignee's commission is five per cent. on the first thousand dollars realized ; seven

If per cent. in all, on the sum actually realized, when it is one, and is under five thousand dollars; and eight and fourths per cent. in all, on the sum realized when it exceeds five thousand dollars.

for the use of premises to store goods of the insolvent debtor, from the time of the commencement of the proceedings to the date of the order, should be paid by the assignee, and charged as a part of his expenses (re *Hufnagel*, 12 B. R. 554).

An assignee had, under the former Acts, the sole right to appoint and select his own professional adviser to act as the solicitor for the estate; and he could not be made to change his solicitor, upon some reasonable ground, and, even in that case, the assignee's refusal of getting rid of the objectionable solicitor, was by itself no ground for removing the assignee from his office, if he refused to change his solicitor (re *Lambe*, 17 C. P. U. C. 183-5; ex parte *Tomlinson*, 2 B. R. 10).

Now under this section, no assignee shall employ any counsellor-at-law, without the consent of the inspectors, or of the court.

It is also provided, that the attorney of the assignee would have a lien on the documents, which came into his hands in the course of his employment, as the fruit of his labour or expense (ex parte *L. R. 4 Ch. D. 129*; re *Messenger*, L. R. 3 Ch. D. 317).

The assignee shall call meetings of creditors whenever required in writing to do so, by the inspectors or by five creditors, if there are five, or by all the creditors, if there are less than five, or by the judge, and he must specify in the notice calling any meeting, the purpose thereof.

9 Vict. chap. 30, s. 13, amended this section, by adding the words "five creditors," the following words: "if there are five or more, or by all the creditors, if there are less than five" (see also sections 100-1-2-3).

The assignee shall deposit at interest in some chartered bank, to be appointed by the inspectors or by the judge, all sums of money which he may receive in his hands belonging to the estate, whenever such sums amount to one hundred dollars; such deposit shall not be made in the name of the assignee, but on pain of dismissal, but a separate deposit account shall be kept.

for each estate of the moneys belonging to such estate, in the name of the assignee and of the inspectors (if any) and such moneys shall be withdrawn only on the joint cheque of the assignee and of one of the inspectors, if there be any.

The interest accruing on such deposit shall appertain to the estate, and shall be distributed in the same manner and subject to the same rights and privileges as the capital from which such interest accrued.

If in any account or dividend sheet made subsequent to any deposit in a bank, the assignee omits to account for or divide the interest then accrued thereon, he shall forfeit and pay to the estate to which such interest appertains, a sum equal to three times the amount of such interest; and he may be constrained so to do by the judge, upon summary petition and by imprisonment as for a contempt of Court.

At every meeting of creditors, the assignee shall produce a bank pass book showing the amount of deposits made for the estate, the dates at which such deposits shall have been made, the amounts withdrawn and dates of such withdrawal, of which production mention shall be made in the minutes of such meeting, and the absence of such mention shall be *prima facie* evidence that it was not produced thereat; the assignee shall also produce such pass book whenever so ordered by the judge, at the request of the inspectors or of a creditor, and on his refusal to do so he shall be treated as being in contempt of Court.

The assignee who shall make or cause to be made any false entry in such pass book, with a view to deceive the inspectors, creditors or judge, shall be guilty of a misdemeanor, and shall be liable, at the discretion of the Court before which he shall be convicted, to punishment by imprisonment for a term not exceeding three years, or to any greater punishment attached to the offence by any Statute.

A copy of this section must be printed by the official assignee, and posted up in a conspicuous place in his office, and at every meeting of creditors a printed copy thereof must be laid on the table (see 40 Vict. s. 34).

46. Upon the death of an assignee or official assignee, or upon his removal from office, or upon his discharge, the estate shall remain under the control of the judge until the appointment of another assignee or official assignee, as the case may be, when the estate shall become vested in such other assignee or official assignee.

47. After the declaration of a final dividend, or if, after using due diligence the assignee has been unable to realize any assets to be divided, the assignee shall prepare his final account, and present a petition to the judge for his discharge, after giving notice of such petition to the insolvent, and also to the

inspectors, if any have been appointed, or to the creditors by circular, if no inspectors have been appointed; and he shall produce and file with such petition a bank certificate of the deposit of any dividends remaining unclaimed, and of any balance in his hands; and a statement showing the nominal and estimated value of the assets of the insolvent, the amount of claims proved, dividing them into ordinary, privileged or secured and hypothecary claims, the amount of dividends or of composition paid to the creditors of the estate, and the entire expense of winding up the same. And the judge, after causing the account to be audited by the inspectors, or by some creditor or creditors named by him for the purpose, and after hearing the parties, may grant conditionally, or unconditionally, the prayer of such petition, or may refuse it.

48. Any assignee who neglects to present such a petition within six months after the declaration of a final dividend, or within three months after he shall have been required by the inspectors or by any creditor of the estate, after it shall have been ascertained that there are no assets wherewith to declare a dividend, shall incur a penalty not exceeding one hundred dollars.

(2.) The provisions of the next preceding section shall apply to all persons who have acted or are acting as assignees under "The Insolvent Act of 1869," or in either of the Provinces of Quebec or Ontario under the Act formerly in force therein, called and known as "The Insolvent Act of 1864," or any Act or Acts amending or continuing the same or either of them; and any such person who neglects to present such a petition as therein mentioned within the following delays respectively, shall incur a penalty of one hundred dollars, that is to say:—

(a) In case a final dividend has been declared before the coming into force of this Act, or in case the assignee has been unable to realize any assets to be divided, then within three months after this Act has come into force;

(b) In case a final dividend is declared after the coming into force of this Act, then within six months after the declaration of such final dividend.

#### COMPOSITION AND DISCHARGE.

49. If at the first meeting of the creditors, or at any time thereafter, the insolvent files with the assignee a consent in writing to his discharge, or a deed of composition and discharge, signed by at least a majority in number of the creditors who have then respectively proved claims of one hundred dollars and upwards, or if at such first or at any subsequent meeting an offer in writing be made by the insolvent to compound with his creditors, specifying the terms and conditions of the proposed composition, and such offer be approved of by a majority in number of such creditors present at such meeting, the assignee shall call another meeting of the creditors to take such consent or such deed or offer of composition and discharge into consideration; and in every case such deed of composition or offer of composition shall be on condi

tion, whether the same be expressed or not, that if the same be carried out, the insolvent shall pay the costs incurred in insolvency, including those for the confirmation of such composition.

It will be observed that, under this section the assignee must call the meeting when the consent to the discharge, or the deed of composition is signed by the majority of those creditors who have then proved claims to the amount of one hundred dollars or upwards. In deciding whether he should call the meeting for the consideration of the consent or deed, the assignee need not consider whether the insolvent has obtained the three-fourths in value, although, as we shall hereafter see, the three-fourths in value must ultimately be obtained to give the deed validity.

The requirement of the majority in number is a safeguard to prevent the assignee calling the meeting without sufficient cause. The provision requiring the calling of the meeting is as necessary in the case of a deed of composition as it is in the case of an offer by the insolvent to compound or a consent to his discharge. This provision is not merely directory, for, if not complied with, the deed will be void as against dissentient creditors (re *McLaren and Chalmers*, 1 Appeal Reports Ont., 68). The intention of the Act was that before a minority were compelled to accept a certain composition they should have an opportunity of explaining their views, and of bringing before the general body of creditors their reasons in opposition to the acceptance of a composition. Until the deed is submitted to such meeting, it is only a "proposed composition and discharge" (ib. 71; per Moss J. A.).

In the opinion of the writer, the calling of the meeting of creditors to take the consent or deed of composition into consideration is a useless and unnecessary proceeding, and the provision requiring it should be repealed. It seems to have been imported into our Act by analogy to the proceedings in England, in the case of liquidation by arrangement, but in the latter case there is no deed or consent signed by the creditors. The result is accomplished by resolution. Under our Statute, the meeting is not to be called unless the deed is signed by the majority in number of those who have then proved claims, and the meeting is called

merely to approve of what the creditors have already approved of in signing the deed. In practice, when the deed is signed by the majority in number and three-fourths in value of the insolvent's creditors before the meeting takes place, no creditors attend the meeting, the composition being already settled by the requisite signatures; and even under the 52nd section, the requisite number of signatures carries the matter before the judge, whether the creditors at the meeting approve or disapprove of the deed. Besides, under section 51 a creditor may put in his objections without attending the meeting. The whole matter might be advantageously left to the judge for decision.

The 97th section of the Act of 1869 required the assignee to give notice by advertisement of the deposit of the deed with him. The object of this was to inform creditors, who were not assenting parties to the deed, to oppose its being acted on (*Nicholson v. Gunn*, 35 Q. B. U. C. 7).

Under the 96th section of the Act of 1869, a reconveyance to the debtor, if in accordance with a deed of composition and discharge, was as valid as an ordinary sale to a third person after all the preliminary proceedings had been taken (see section 60 of this Act); but, under the 97th section of that Act, it was a condition precedent to the assignee making the reconveyance, that he should first have immediately given notice by advertisement of the deposit of the deed with him, and in the absence of such notice his reconveyance was not binding upon non-assenting creditors, and would not confer to the party to whom it was made a valid right to sue in respect of the property conveyed (*Nicholson v. Gunn*, 35 Q. B. U. C. 7; see also *Allan v. Garratt*, 30 Q. B. U. C. 180).

There are three modes by which an insolvent may obtain a discharge from his liabilities, either by a consent signed by a majority in number of the creditors who have proved claims of over one hundred dollars, and who represent at least three-fourths in value of all the claims which have been proved, whether above or below one hundred dollars, or by a deed of composition, signed in like manner, or, in default of either of these, an order from the judge for his discharge under the 64th section, obtained after the lapse of a year from the assignment or the issuing of the writ of



attachment. A consent in writing to a discharge has a different effect from a deed of composition. The latter involves a restoration of the estate to the insolvent. The former does not necessarily involve a composition with the debtor or a restoration to him of the estate. It remains to be administered by the Court in insolvency for the benefit of the creditors, and the consent operates as a release of the debtor personally, the creditors accepting in satisfaction their remedy in the insolvency against the insolvent's estate (see *Shaw v. Massie*, 21 C. P. U. C. 275). It has been held that a consent to a discharge of an insolvent is operative even without an assignment, provided the insolvent makes and files an affidavit that he has no estate or effects to assign (re *Perry*, 2 U. C. L. J. N. S. 75; *Jones, Co. J.*). This, however, cannot be regarded as law under the present Act, at all events the consent could not be operative under the Act (see *Green v. Swan* 22 C. P. U. C. 307; *Prevost v. Drolet*, 18 L. C. J. 300; *Squire v. Watt*, 29 Q. B. U. C. 328); whatever effect it might have at common law, on the creditors who actually signed it (see ante 7-8).

The word "insolvent" in this section means an insolvent whose estate is being administered under the Act, and all these sections as to composition only apply when the estate is in insolvency. A deed of composition and discharge made without any proceedings in insolvency (before or after), without any assignee being appointed, and altogether outside of the Insolvent Court, cannot be a bar to non-assenting creditors, though executed by a majority in number and three-fourths in value of the insolvent's creditors, although, perhaps, under the present Act the deed may be invoked and acted on, whether made before, pending, or after an assignment, or the issue of a writ of attachment; but the deed must be filed with the assignee, and confirmed and acted on in the same manner as if wholly made after the assignment. The 94th section of the Act of 1869, which provided that the deed might be made before, pending, or after proceedings upon an assignment, only meant that if a debtor had proposed an assignment, and a deed had been prepared and possibly executed by some of his creditors, the issuing of an attachment or the execution of a voluntary assignment should not defeat what had already been agreed.

upon, but that the deed might be proceeded with and acted on as if made after the entrance into insolvency (*Green v. Swan*, 22 C. P. U. C. 307).

Though a deed of composition may, probably, be signed before the insolvency proceedings, yet it would seem that it cannot be acted on in any way until the first meeting of creditors for the appointment of an assignée. It may then be filed under this section; and the meeting for approval called. It is presumed that the judge would be justified in confirming the deed if, at the close of this meeting, the majority in number and three-fourths in value of those who had then proved claims had signed the deed, although there might be a large proportion of creditors who had not then proved (see also notes to section 53).

The policy of the Insolvent Act being the equal distribution of the assets of the insolvent among all his creditors, no deed of composition and discharge can be binding on non-assenting creditors, unless it provides equally for the claims of all, whatever may be the proportion of the proposed composition to the original debts which the majority may agree upon. If a deed by express terms, or by implication, by not providing for a creditor, excludes him, such a deed cannot be a composition deed within the meaning of the Act. If the deed is made between the several persons whose names and seals are subscribed and affixed thereto and the debtor, only the creditors who sign will be parties to the deed or bound by it. A non-assenting creditor cannot be regarded as a party thereto, and will not, in any way, be affected by its provisions (*Shaw v. Massie*, 21 C. P. U. C. 266; re *Rawlings*, 9 Jur. N. S. 317; ex-parte *Cockburn*, 9 L. T. N. S. 465; *Chesterfield Col. Co. v. Hawkins*, 3 H. & C. 677; *Benham v. Broadhurst*, 3 H. & C. 472). The deed to be binding on all the creditors must purport on the face of it to be for the benefit of all, should, in express terms, be made between all the creditors on the one hand and the debtor on the other; and, as to non-assenting creditors, the deed should be so framed as to be binding on the insolvent and that the non-assenting creditor shall receive his composition equally with those executing. The amount coming to the non-assenting creditor should be paid to him, or at least tendered to him, unless it

is part of the agreement in the deed of composition, that the amount payable should be disposed of in some other way.

It is necessary, under the present Act, that the deed of composition, or the consent to the discharge, should be signed by the majority in number of the creditors who have proved claims over one hundred dollars. The creditors who have signed the deed must also represent three-fourths in value of the claims which have been proved, whether these claims are above or below one hundred dollars (see sections 2 [h] and 56), so that creditors representing claims under one hundred dollars are computed in the three-fourths' value, though they are not considered in estimating the majority in number. There is no doubt that, before the signature of a creditor to a deed of composition or a consent to a discharge can be of any avail, the creditor must have proved his claim (see also notes to section 52; see also *Rooney v. Lyon*, Q. B. U. C. not yet reported).

But creditors whose claims are not barred by a discharge, or who hold privileged claims, are not to be computed in the majority in number and three-fourths in value required to give validity to a deed of composition or consent to a discharge (see section 63 on this, and also as to claims which are not barred by the discharge; see also section 2 [h]).

In estimating the proportion on secured claims, only the balance for which the creditor ranks on the estate, after deduction of the value of his security, can be considered (see section 82; re *Lawson*, 5 U. C. L. J. N. S. 232; see 40 Vict. s. 21; see also Notes to s. 84).

If the deed of composition is not made between the debtor and all his creditors, it should be shown that the creditors who are parties to it, are the only creditors within the meaning of the Act (*Dredge v. Watson*, 33 Q. B. U. C. 165).

A deed of composition and discharge made with the insolvent's partnership creditors only, will be valid where there are no separate or individual creditors (*Preston v. Hunton*, 37 Q. B. U. C. 177).

But if it appears that the members of the insolvent firm have individual liabilities, and the deed only provides for partnership debts, it will not bind non-assenting creditors, whether they are

creditors of the firm or of the individual partners (*Allan v. Garratt*, 30 Q. B. U. C. 165).

Where the deed is signed by the majority in number and three-fourths in value, it is binding on a creditor who does not execute it (*Preston v. Hunton*, *supra*).

A deed of composition and discharge made only with an insolvent's partnership creditors is not binding upon his individual creditors, when he has such creditors. So the deed must be made with all the insolvent's creditors, and where a deed was made with the "several persons whose names and seals are hereunto set and affixed," it was held that it only bound those executing the deed and not a non-executing creditor (*Pidgeon v. Martin*, 25 C. P. U. C. 233).

When, after an assignment and the execution of a deed of composition and discharge, defendant, an insolvent, permitted an arbitration upon the plaintiff's claim to be proceeded with, personally attending the arbitration, and not setting up the deed as a bar, it was held that this would preclude the defendant from afterwards setting up the deed as ground for setting aside a *fi. fa.* issued against him on the award. Where a deed of composition and discharge contained a covenant by the insolvent with the parties thereto of the first part to deliver the notes mentioned in the deed on request, &c., and the covenant had been fulfilled at the time of the application for the confirmation of the discharge, Logie, Co. J., held on an application to confirm the discharge that the deed was not void for inequality (re *Lawson*, 5 U. C. L. J. N. S. 232; Logie, Co. J.).

\* A partnership composed of A. and B. having gone into insolvency, an assignee to their joint and separate estates was in due course appointed. The firm effected a composition with its joint creditors at the rate of thirty-five cents on the dollar, and the firm's assets were handed over to A. one of the partners. A. also effected a composition with his separate creditors at the rate of fifty cents on the dollar. He was discharged from his separate liabilities, and his private estate handed over. B. also effected a composition with his separate creditors, at the rate of half a cent on the dollar, and received a discharge from his separate liabilities. The

creditors in each class were declared to be, and actually were, the majority in number, holding three-fourths of the liabilities in such class. The creditors of the firm and of A. individually were paid by A., and the deed provided for a reconveyance of all the estates, firm and individual, to A. on the composition being paid. The individual creditors of B. received their composition from him in cash, and were also appointed to get the thirty-five cents from the firm, and the fifty cents from A. individually. The confirmation of the deed of composition was opposed by a creditor of the firm, on the ground of inequality, providing different compositions for different creditors, that the firm creditors and the creditors of each partner individually ought to have received the same rate. It appeared that the contesting creditor only received the thirty-five cents on the dollar, and some of the other creditors received the thirty-five cents, the fifty cents paid by A. and the half cent by B. It was held that the contesting creditor had a right to the realization of the individual estates of the firm, and that the deed was unequal, and confirmation thereof was therefore refused (re *Hutchins*, 1 *Revue critique*, 183; citing *Tomlin v. Dutton*, L. R. 3 Q. B. 466; *Walker v. Neville*, 3 H. & C. 403).

W. H. Kerr, Q.C., of Montreal, one of the editors of "*La Revue Critique*," epitomizes the law in the case of insolvent partnerships as follows: The creditors of the firm, and the separate creditors of the partners, must be placed on the same footing as regards the composition; the majority of creditors in such case being the requisite majority in number and value of all such creditors regarded but as one *masse*; or each partner may be treated as individually insolvent, the deed of composition being entered into between him and the joint creditors, and his own separate creditors, all being placed on the same footing as regards the composition. The said deed must not contain any re-conveyance of either estate to the insolvent, but to be merely a discharge from his liabilities, the estates to remain in insolvency (see article 1, *Revue Critique*, 171).

The deed of composition should provide for the payment of all claims which are provable against the estate; and in the case of a partnership should provide for the creditors of the respective

partners, as well as for the creditors of the firm as partners. Though the deed is made after an assignment, it is necessary that the insolvent should be a party to it, and should execute it. When the deed is made before an assignment this is *a fortiori* necessary, for there is no one else with whom the creditors can contract (re *Garratt*; 28 Q. B. U. C. 266 ; see also *Allan v. Garratt*, 30 Q. B. U. C. 165).

When a deed of composition is regularly executed by the majority in number and value of the creditors of an insolvent, it is binding on a creditor who does not execute, and who has never proved his claim on the estate. In such case, a creditor, whose debt is inserted in the schedule, is bound to accept the composition payable under the deed, when tendered to him, and if he does not he cannot resort to any other means of recovering his debt from the insolvent. In August, 1872, the plaintiff issued a *fi fa* against the defendant's lands, a portion of which defendant, in November, sold to one K. On the 1st of May, 1873, defendant made an assignment in insolvency, and, on the 31st obtained a deed of composition and discharge from the necessary proportion of his creditors. On the 12th of August, this was confirmed by the county judge ; and, on the 15th of August, defendant's estate was reconveyed to him by the assignee. The plaintiff was one of the duly scheduled creditors, but took no part in the insolvency proceedings ; and, although requested to remove his writ, refused to do so, and advertised the lands for sale, contending that the sale to K. was a withdrawal of these lands from the defendant's assets, so that they never passed to the assignee. The Court held that the plaintiff's debt was discharged by the insolvency proceedings, that the fact of the sale to K. could not alter the plaintiff's position, and that his only remedy was under the deed of composition and discharge. The proceedings on the *fi. fa.* after the assignment were, therefore, set aside (*Davidson v. Perry*, 23 C. P. U. C. 346).

Where the plaintiff obtained a judgment, on the 4th of October, 1864, and a *fi. fa.* lands was issued thereon, and kept renewed from time to time ; and on the 8th of March, 1866, defendant made an assignment under the Insolvent Act, and obtained a certificate of

discharge on the 30th March, 1867, the plaintiff having proved for the full amount of the judgment in the Insolvent Court, the *fi. fa.* was set aside (*Dickinson v. Bunnell*, 19 C. P. U. C. 216).

Where the assignment is not *ipso facto* void, the jurisdiction of the Court attaches so that the granting or refusing of a discharge in such case is a question not of jurisdiction so much as the exercise of a legal discretion, and, if not appealed, it may be found very difficult if not impossible to call it in question except it be assailable on the ground of fraud. Some nine years after defendant had obtained his discharge in insolvency, the plaintiff, a scheduled creditor, issued a *fi. fa.* against defendant's goods, on a judgment recovered before the discharge, contending that the discharge was void because defendant had, previous to his assignment, fraudulently allowed a judgment to be recovered against him and his assets taken; and also because his assets being so taken there was nothing at the time of the assignment on which it could operate. It appeared, however, that the plaintiff consented to the assignment, and did not appeal from the order of discharge; nor did he when the discharge was being granted raise the objection of no assets. It was held that the *fi. fa.* goods must be set aside, and that the plaintiff's remedy, if any, was by action on the judgment (*Parke v. Day*, 24 C. P. U. C. 619).

The Statute does not require the assignee to be a party to the deed of composition and discharge. The composition and discharge is an arrangement between the creditor and the debtor alone, and where there is an assignment in insolvency, and the deed is acted on and confirmed under the Act, the mere fact of the assignee not being a party to it will not render it invalid (*Dredge v. Watson*, 33, Q. B. U. C. 165).

After the dissolution of a partnership one partner may sign the firm name thus "Wakefield, Coate & Co., per F. W. Coate," and it will be a good execution of the deed of composition and discharge for the firm (re *Lawson*, 5 U. C. L. J. N. S. 232; *Logie, Co. J.*)

If a creditor who signs the deed accepts a composition under it, he thereby ratifies the deed and cannot afterwards object to any defect of execution. Thus it was held no objection that some of

the assenting creditors had executed it in the name of their firms by procuration, and that no power of attorney was proved, it appearing that they had accepted the composition under it (*Allan v. Garratt*, 30 Q. B. U. C. 165).

The Act of 1869 differed materially from the present Act, in reference to the confirmation of deeds of composition and discharge. It was not obligatory under the former Act to procure such confirmation. It might be acted on if advertised under the 97th section, and the only difference between the confirmed and unconfirmed deed was that in the latter case the burthen of proof of the discharge being completely effected, was on the insolvent. The present Act seems to render confirmation necessary (see sections 61 and 66), although under the 60th section of the Act, the assignee is required to reconvey to the insolvent as soon as the deed of composition is executed (see notes to this section).

An agreement to accept a composition, in respect of which no default has been made, is a good defence to an action brought for the original debt (*Slater v. Jones*, L. R. 8 Ex. 186). The effect of a default is to remit the creditor to his original position (*Newell v. Van Pragh*, L. R. 9 C. P. 96); and he may then maintain an action for whatever part of the original debt may remain unpaid (*Edwards v. Coombe*, L. R. 7 C. P. 519).

If the creditors have appointed a trustee for the distribution of the composition, who, by no default of the debtor, makes default in the payment thereof, the debtor is not liable for such default, and an action brought against him will be restrained (re *Taylor*, 43 L. J. Bank. 25). It would seem that the fact that no tender of the composition has been made by such trustee, does not amount to a default, although a failure by the debtor to tender a composition where no trustee is appointed does so (ib.; see also *Goldney v. Lording*, L. R. 8 Q. B. 182).

Acceptance of a composition does not, as a general rule, discharge the debt, until payment is made (*Edwards v. Huncher*, L. R. 1 C. P. D. 111). But it has been held in England that the creditors may, by their resolution for the acceptance of a composition, provide that the securities for the payment of the composition shall



be taken in discharge of the original debt (*re Hatton*, L. R. 7 Ch. App. 723).

A creditor will not be allowed to sue the debtor, if the assignee is supplied by the debtor with sufficient funds to pay the composition, and he neglects to pay it (*ex parte Waterer*, 29 L. T. N. S. 907; *Campbell v. Im. Thurn*, L. R. 1 C. P. D. 267).

But a creditor cannot sue the debtor before the time appointed for payment of the composition (*Slater v. Jones*, L. R. 8 Ex. 186). If the composition is not paid or tendered through some act of the creditor, or if the creditor has done something, making it inequitable for him to enforce his legal rights, it has been held in England that the Court will relieve the debtor from the consequences of non-payment of the composition at the proper time (*ex parte Peacock*, L. R. 8 Ch. App. 682). It has also been held in England that after a resolution for a composition is passed and registered, until default in payment of the composition, the debtor may deal with his property as owner (*ex parte Hoare*, L. R. 16 Eq. 625; see *ex parte Burrell*, L. R. 1 Ch. D. 537).

A composition agreement by several creditors, although by parol so as to be incapable of operating as a release, and although unexecuted so as not to amount in strictness to a satisfaction, will be a good answer to an action by a creditor for his original debt, if he accepted the agreement in satisfaction thereof. The defendant, a trader, being in insolvent circumstances, wrote to the plaintiff, a creditor, in Scotland, giving him a statement of his account, and informing him of his intention to make some arrangement with his creditors, and that the plaintiff must rank with the others on his estate which he stated would not pay more than fifty cents on the dollar, to which the plaintiff replied expressing no dissent, and again that he was satisfied if there was no preference given. In the meantime, the defendant had effected an arrangement with his creditors for a composition of thirty cents in the dollar, on his representation that plaintiff would accept it, without which the whole arrangement would have fallen through, and the defendant must have gone into insolvency. Defendant, on the same day, by letter informed the plaintiff of the arrangement, to which the plaintiff replied without expressing dissatisfaction. Afterwards, without dis-

sent, he received the instalments of the composition sent to him, and on the receipt of the last instalment he acknowledged it as a payment of "the last instalment of your indebtedness to me." It was held by the Court that the plaintiff must be deemed to have accepted the composition with the other creditors, and, therefore, that he could not sue defendant for the balance (*Mitchell v. Mitchell*, 27 C. P. U. C. 160. This, however, was a composition outside of the Insolvent Act. In proving for the original debt, after the failure of the debtor to pay the amount of a composition which he has agreed to pay, the creditor must give credit for any sums paid to him on account of the composition, and also deliver up any security held by him for the payment thereof (ex parte *Ellis*, 2 M. & A. 370; *Pike v. Dickinson*, L. R. 7 Ch. App. 61). Where the deed of composition provides that the original claims of the creditors shall revive on non-payment of the composition, on such failure, the creditor would only be required to give credit for any sums paid on the original debt and not on the amount of composition. Where the firm of A. & Co., made an assignment, and the Molsons Bank proved a claim against them for \$9,785, and A. & Co. effected a composition at fifty cents in the dollar, obtained a discharge, and had their property restored to them. A. & Co., then resumed business, and the Molsons Bank received certain sums on account of the composition. A. & Co., failing to pay the whole composition, afterwards made a second assignment and the Molsons Bank filed a claim for the whole amount due at the time of the first assignment, namely, \$9,785, less what had been paid as composition. It was contended that the Molsons Bank were not, under the circumstances, entitled to more than the balance of the composition, but the Court held that the agreement for composition was annulled by the default, and that the Bank were entitled to the balance due on the original debt after deducting the composition payments as so much cash received thereon (*Molsons Bank and Buchanan*, 4 Revue Legale, 225).

The majority of the creditors of an insolvent, must exercise their powers *bona fide*, for the common benefit of all, and, if from motives of kindness, or benevolence, towards the insolvent, they enter into any arrangement beneficial to him only, it will be a

fraud upon the minority ; but the mere fact, that they may have acted partly from such motives, is not *per se* sufficient evidence of fraud (ex parte *Linsley*, L. R. 9 Ch. App. 290 ; 29 L. T. N. S. 857).

A vote in favour of the acceptance of a composition, given out of motives of kindness to the debtor, is void (re *Russell*, L. R. 10 Ch. 255 ; re *Sedley*, L. R. 8 Ch. 727). But, if the resolution which the creditors have passed, may be considered as beneficial to them, the fact that some of them were partly influenced by motives of kindness towards the debtor will not necessarily make it void (ex parte *Linsley*, L. R. 9 Ch. App. 290).

Not only is a vote which is not given *bona fide*, itself void, but a creditor cannot bring an action upon a promise made to him by a stranger, in order to induce him to vote in a particular manner, or even merely abstain from voting (re *Suunderson*, L. R. 19 Eq. 65).

So also it has been held in England, in the case of liquidation by arrangement, that if the resolutions passed by the creditors are not *bona fide* for the benefit of the creditors, but are passed for the purpose of discharging the debtor, without any real benefit to the creditors, as if there are no assets to distribute, they will be invalid (ex parte *Staff*, L. R. 20 Eq. 775) ; so also, a resolution to accept a composition less than the assets would be sufficient to pay, was held to be invalid (ex parte *Page*, L. R. 2 Ch. D. 323).

The statement of affairs of a debtor, who had filed a liquidation petition, shewed that his debts amounted to £11,358, while his assets were only £75. Of the debts, the preferential claims amounted to £127. The creditors, by the proper statutory majority, resolved to accept a composition of 1s. in the pound, to be paid within one month after registration of the resolution, no security for its payment being offered. The Court held that the creditors were animated by motives of kindness towards the debtor, that the resolution was not in the interest of the creditors, but for the benefit of the debtor, and that it did not bind a dissentient creditor (re *Terrell*, L. R. 4 Ch. D. 293 ; approving of ex parte *Page*, L. R. 2 Ch. D. 323 ; and ex parte *Russell*, L. R. 10 Ch. 255).

If the debtor has kept books in his business, they must be pro-

duced on the demand of any inquiring creditor, and the debtor must answer all inquiries in reference to any entry in such books, which bears upon the question of the exact condition of his affairs (re *Holmes*, 12 B. R. 86). If a creditor is induced to vote by any unfair means, whether known to the debtor or not, his vote so influenced operates as a fraud on the other creditors, and makes the composition voidable by any of them (re *Sawyer*, 14 B. R. 241).

A deed of composition and discharge allowed an insolvent to carry on his business, keeping an account of the management thereof, and holding himself responsible to account to the creditors for the business transacted; and the deed further instructed the assignee not to make any inventory, or take any proceedings on such assignment, other than those required to notify his appointment, call in the creditors, and give notice of the deposit of, and act on, the deed of composition. On an application for a confirmation of the deed of composition and discharge, one of the creditors for the sum of \$1,740, duly proved, contested the deed on the ground that the majority in number, and three-fourths in value of the creditors, had no right or power to give such directions to the assignee, or to bind non-assenting creditors. The Court, considering that a large majority of the creditors had signed the deed, that no charge was made, either against the insolvent or the assignee, of any dishonest intention, and that the course authorized was beneficial to the creditors, rejected the application of the contesting creditor, but granted to him "acte" of his petition to avail as a formal protest against insolvent, assignee, and all others concerned, in so far as the proceedings complained of had any tendency to bind petitioner to any greater extent than he could legally be bound by the same (re *Lamontagne*, 2 Quebec Law Reports, 160).

A trader, in insolvent circumstances, made an assignment of his property to several of his principal creditors, in trust for the benefit of his creditors generally. Afterwards it was agreed that the creditors should accept twenty cents on the dollar, and discharge the debtor, whereupon the plaintiffs and other creditors executed a deed to carry out this agreement. Before payment of the composition, however, the trustees reassigned the property to

the debtor, on his undertaking to pay the several creditors the amount of their claims, which he did pay to the trustees, but failed to pay to the plaintiffs. The Court held that the trustees were liable to make good to the plaintiffs the sum coming to them, if the property which had been assigned to them by the debtor was sufficient to realize the amount of the composition agreed on, and as to this, if desired by the trustees, an enquiry by the master was directed (*National Bank, Albany, v. Moore*, 21 Grant, 269).

50. Such meeting shall be called by at least one advertisement published in the Official Gazette, stating the time, place and object of the meeting, and also by a letter or card postpaid addressed by mail, at least ten days before the meeting, to each of the creditors mentioned in the list of creditors furnished by the insolvent, and to all other creditors who may have proved their claims, although not mentioned in the said list, indicating in substance, in addition to the time, place and object of the meeting, the terms and conditions of the proposed composition and discharge; and such meeting shall not take place less than fifteen days after the first publication of the said advertisement.

(See notes to section 20; see also section 101.)

51. The creditors present at the meeting to take into consideration the proposed discharge, or composition and discharge, may, by resolution to that effect, express their approval thereof or dissent therefrom; and any creditor may, at any time before or during the said meeting, file with the assignee his objections in writing to the proposed discharge, or composition and discharge.

If a creditor does not attend the meeting and does not file with the assignee his objections in writing under this section, it would seem that he may still, under the 53rd section of the Act, appear and oppose the confirmation of the discharge.

In reference to the discharge which may be obtained under the 64th section of the Act, there is no provision for filing objections.

52. If at the close of the meeting or at any time thereafter, the insolvent has obtained the assent to his discharge, or to the proposed composition and discharge, of a majority in number of his creditors who have proved claims to the amount of one hundred dollars and upwards, and who represent at least three-fourths in value of all the claims of one hundred dollars and up-

wards which have been proved, the assignee shall annex to the deed or consent to a discharge, or to the deed or offer of composition and discharge, a certificate to that effect, in which he shall state the total number and total amount of claims of one hundred dollars and upwards which have been proved, the number of creditors who have given their written assent to the discharge or to the proposed composition and discharge of the insolvent, and the amount of proved claims of one hundred dollars and upwards which they represent. The assignee shall further annex to such certificate a copy of any resolution adopted at the meetings of creditors in reference to the discharge, or to the proposed composition and discharge, and all the objections which may have been filed with him to such discharge, or composition and discharge, together with a certificate as to the amount of claims of the creditors who shall have agreed to or opposed such resolution, or who may have filed objections in writing to such discharge or proposed composition and discharge, indicating the amount of such claims of one hundred dollars and upwards which have been proved, and whether from their nature they will be affected by the proposed discharge or composition and discharge.

The assignee shall further state in such certificate the ratio of dividend actually declared and likely to be realized out of the estate for the unsecured creditors, and shall, without delay, transmit such certificate to the clerk or prothonotary of the Court in the county or district wherein the proceedings are carried on.

Any wilful misrepresentation in the certificate of a material fact, for the purpose of deceiving the judge, is a misdemeanor (see section 139).

The object in requiring the certificate to show whether the claims proved will, from their nature, be affected by the discharge, is to assist the judge in determining whether the proper proportions have signed the deed, creditors not affected by the discharge not being estimated.

It would seem that the certificate of the assignee is not conclusive, and that the judge, on the application for discharge, has a right to go behind it in cases of apparent fraud. The judge has a duty to perform and is required to see that the insolvency law is not used as a mere white-washing machine. In a case under the Act of 1869, the assignee's certificate stated that the insolvents, petitioners for a discharge, had complied with all the requirements of the law, but it appeared that from the time of the assignment not one meeting had been called under the Act. The judge examined the parties on the application for discharge and refused

the discharge on the ground of non-compliance with the requirements of the Act (re *Quesnel*, 2 *Revue Critique*, 478).

Prior to the passing of this Statute, it was held by the Court of Appeals in Quebec, under the Act of 1869, that if the majority in number of the creditors signing the deed of composition represented in value three-fourths of "the proved debts," the composition would be valid whatever might be the amount of the "admitted although unproved liabilities" of the insolvent as shewn by the schedules sworn to by himself. The insolvent is required to show the amount of his liabilities in his schedule of liabilities, but for the purpose of deciding whether the insolvent has acquired the three-fourths in value necessary to give validity to a deed of composition and discharge we are to take three-fourths of the liabilities of which proof is furnished (re *Toussaint*, 1 *Quebec Law Reports*, 127).

This decision was rendered in a case in which the schedule of liabilities, prepared and sworn to by the insolvent, showed \$50,000, and only about one-tenth of this amount was proved.

The present Act follows, so to speak, the decision of the Court of Appeals. It speaks expressly of the claims which have been proved. It is, as we have already seen, necessary to the validity of a deed of composition and discharge, that the creditors signing it should prove their claims; and now, under this section, the curious result will follow, that if the schedule of liabilities furnished by the insolvent shows \$100,000 of liabilities of which only \$10,000 is proved, only three-fourths of the latter claims are required to give the deed validity, and a creditor contesting the deed of composition cannot, as against the insolvent, take his own statement of liability as the criterion under this section.

The cases of re *Langs* (4 U. C. L. J. N. S. 283), and re *Lawson* (5 U. C. L. J. N. S. 232; *Logie Co. J.*), cannot now be regarded as law in so far as they go to show that the creditor need not prove, in order to legally sign the deed.

We have already expressed an opinion that the judge would be justified in confirming the deed if signed by the proper proportion of claims proved at the close of the meeting called for the approval of the deed. The deed however cannot be actually confirmed for

a month after the close of this meeting, and claims may be proved in the meantime.

If a secured creditor elects to accept his security and not prove, and the official assignee, on behalf of the creditors, assents to his retaining the security on these terms, he ceases to be a creditor who can prove, and his debt cannot be taken into consideration in estimating the amount of indebtedness of which there must be the three-fourths value to render the deed of composition effectual (re *Lawson*, 5 U. C. L. J. N. S. 232; *Logie*. Co. J.; *Rogney v. Lyon*, Q. B. U. C, 1876, not yet reported; see 40 Vict. s. 21; also notes to section 49) The Act of 1869, in the 94th section, contained the words "subject to be computed in ascertaining such proportion." These words were used to prevent those claims which came under the 100th section, and which could only be barred by the express consent of the creditor from being reckoned against him in determining whether he was to be discharged from his ordinary liability or not. Under the 100th section, the discharge did not apply, without the express consent of the creditor, to any debt due as damages for assault or wilful injury to the person, seduction, or libel, slander, malicious arrest, &c., and the meaning of the words "subject to be computed in ascertaining such proportion," was that the insolvent had a right to have these latter liabilities excluded from his ordinary liabilities, in ascertaining the three-fourths in value under the 94th section (*Dredge v. Watson*, 33 Q. B. U. C., 173; see sections 2 (*h*), 63, 82 and notes to section 49 of this Act). It seems to the writer that the words "subject to be computed in ascertaining such proportion," were wholly unnecessary in the Act of 1869 (see section 100 of that Act), and they are properly left out of the present Act, for sections 63 and 82 provide for the computation required. Debts to which a discharge under the Act does not apply, nor any privileged debts, nor the creditors thereof, are not to be computed in ascertaining whether a sufficient proportion of the creditors of the insolvent have voted upon, done, or consented to any act, matter or thing, under the Act, nor are secured debts to be estimated, except for the balance after deducting the value of the security.



53. An insolvent who has procured a consent to his discharge, or the execution of a deed of composition and discharge, and the certificate of the assignee, within the meaning of this Act, may file in the office of the Court the consent or deed of composition and discharge, with such certificate annexed, and may then give notice (Form J) of the same being so filed, and of his intention to apply by petition, to the Court in the Provinces of Quebec and Nova Scotia, or in the Province of Ontario, New Brunswick, Prince Edward Island, British Columbia, and Manitoba (and in Nova Scotia, when county judges are appointed there) to the judge, on a day named in such notice (which, however, shall not be before the day on which a dividend may be declared under this Act), for a confirmation of the discharge effected thereby; and such notice shall be given by one advertisement in the Official Gazette, and also by letter or card postpaid, addressed to each of the creditors by mail at least one month before presenting the petition to the Court or judge; and upon such application, any creditor of the insolvent, or the assignee under the authority of the creditors, may appear and oppose such confirmation.

It would seem that notice of the filing and of the insolvent's intention to apply for a confirmation of his discharge may be given at once under this section, although the month allowed by section 31 (form I) for creditors to file their claims has not expired (see *Tucker* 7 C. L. J. N. S. 326).

But the day on which the application is made must not be before the expiration of such month (see section 79). The object, in requiring the application for confirmation to be after the day when a dividend may be declared, seems to be to enable all the creditors to come in, and prove their claims. The creditors may file their claims at the first meeting, the deed of composition may be filed then, the meeting for approval may be fifteen days thereafter. A month's notice must be given of the application for confirmation, and, as this notice cannot be given until approval or disapproval of the deed at the meeting, the writer does not see the necessity of the provision, that the application for confirmation shall not be before the day on which a dividend may be declared. It cannot be before this day, as a dividend may be declared in one month from the first meeting (see section 79). Although the judge would be justified in confirming the deed on the claims proved at the close of the meeting, under section 52; yet it is conceived that, if a considerable number of claims were after-

wards proved, he might postpone the application for confirmation that the insolvent might obtain the signatures of these creditors, and very probably the judge would consider it advisable, in the exercise of his discretion, to do so.

Under this section, any creditor of the insolvent may appear and oppose the confirmation. The right to appear is not limited to the creditors named in the statement of assets and liabilities (re *Stevenson*, 1 U.C.L.J.N.S.52; *Logie*, Co. J.). But this can only be understood of a creditor who has proved a claim to the amount of one hundred dollars (see section 2 (*h*)). The 114th section provides that, in the contestation of an application for discharge, or for confirming or annulling a discharge, the facts upon which the contesting party relies shall be set forth in detail, with particulars of time, place, and circumstance, and no evidence shall be received on any fact not set forth. The writer has had some doubt whether this section, taken in connection with the 51st section of the Act, does not render it necessary for the creditor intending to contest the application, to file his objections in writing with the assignee (see also section 54).

An insolvent obtained a deed of composition and discharge, and, before he applied for a confirmation thereof, the assignee delivered him a bill of costs and charges as assignee. The insolvent did not, however, before making the application for the confirmation, ask for the taxation of the assignee's bill, nor did he tender nor pay to the assignee the whole or any part thereof. The assignee, therefore, contested the insolvent's discharge, in his own name and on his own behalf, without authorization from the creditors; and it was held that the assignee had the right to contest the confirmation under these circumstances (re *Arsenault*, 2 Quebec Law Reports, 89). The insolvent having paid the assignee's bill after contestation lodged, the contestation was dismissed except as to the costs thereof, which the insolvent was ordered to pay (*ib.*).

Prior to the passing of the Act of 1869, it was held by Sherwood, Co. J., that it was sufficient to publish notice of the application for discharge in the *Canada Gazette*, and that such notice need not

necessarily be published in the *Ontario Gazette* (re *Huffman*, 5 U. C. L. J. N. S. 71).

There can be little doubt that the notice must now be published in the *Gazette* for each Province, as in Ontario in the *Ontario Gazette*, and in Quebec the *Quebec Gazette*. This section requires that the notice be published in the Official Gazette, and the interpretation clause of the Act, section 2 (b), declares that the Official Gazette shall mean the *Gazette* published under the authority of the Government of the Province, where the proceedings in bankruptcy or insolvency are carried on, or used as the official means of communication between the Lieutenant-Governor and the people (see in Ontario, 31 Vict. c. 6, s. 3).

It was held under the 101st section of the Act of 1869, that the notice of an application for the confirmation of a discharge could not be given by advertisement in the *weekly* edition of a daily newspaper, because business men do not see those editions (*Hope v. Frank*, 18 L. C. J. 28).

The present Act does not require insertions in a weekly or other newspapers, unless no *Gazette* is published in the County, District or Province where the advertisement is required to be made, in which case a newspaper is to be designated by the Court or judge for insertion of the advertisement (see section 2 [b]).

In fixing the day for the confirmation of the discharge, the insolvent must be careful that it is a juridical day; for it has always been held impossible for a private person, like a petitioner for discharge, to fix a thing to be done on a non-juridical day. Where, therefore, in the Province of Quebec, an insolvent gave notice of application for confirmation of discharge for the 25th of March (Annunciation Day), and the petition was consequently only presented on the 26th, it was rejected on this ground alone (ex parte *Desève*, 2 Revue Critique, 485; 4 Revue Legale, 656).

This section affords no means of determining the creditors to whom the letter or card must be sent, whether they are only the creditors who have proved or whether those under one hundred dollars must receive notice.

54. If it appears that all the notices and formalities required by law, have been given and observed, and that no objections have been made to the p

posed discharge, or composition and discharge, the Court or judge may, without further notice, and on the petition of the insolvent, confirm his discharge or the proposed composition and discharge; but in case it appears that objections have been made to such discharge or composition and discharge, the application of the insolvent shall not be heard until at least three days' notice shall have been given of the same by the insolvent to the assignee, the inspectors, and to the creditors who shall have objected to the said discharge, or proposed composition and discharge.

The three days' notice to the assignee, inspectors and creditors, is not necessary, unless objections to the discharge have been filed with the assignee.

The insolvent should be present when application is made for the confirmation of his discharge, in order that he may be examined, if any creditor desires to do so (*re Stevenson*, 1 U. C. L. J. N. S. 52; *Logie Co. J.*).

Although no opposition is offered to the discharge, it would still seem to be the duty of the Court to see that the insolvent has made out a case which entitles him, according to the provisions of the Act, to a discharge. In the United States, it has been decided that it is the duty of the Court to examine the record before granting the discharge, and if it appears that the insolvent is not entitled thereto to refuse it, even though the creditors do not interpose objections (*re Wilkinson*, 3 B. R. 286; see also *re Quesnel*, 2 *Revue Critique*, 478).

The discharge does not take effect, until it is signed by the judge (*Pesoa v. Passmore*, 4 *Yeates*, 139).

Where the deed of composition and discharge is executed by attorney or agent, it is not necessary, on an application for the confirmation of the discharge, that the powers of attorney under which the signatures took place should be produced and proved, all that is required is to satisfy the mind of the judge with a reasonable degree of certainty that the deed was executed by a proper proportion of creditors, and the same certainty is not necessary as on a trial between party and party. An affidavit that the attorney or agent executing had authority, and that his acts have been duly confirmed will be sufficient (*re Lawson*, 5 U. C. L. J. N. S. 232; *Logie Co. J.*).

55. The Court or judge shall not confirm the discharge or proposed composition and discharge of the insolvent, unless he shall have produced with his application an affidavit, in the Form K, showing that no one of the creditors who have signed the same, has been induced to do so by any preferential payment, promise of payment, or advantage whatsoever made, secured, or promised to him by or on behalf of the insolvent, and a certificate from the assignee that he has delivered a sworn statement of his liabilities and assets as required by this Act.

In the case of an insolvent firm, it would be safer to produce an affidavit from each member of the firm.

In the United States it has been held that if the insolvent dies before he has taken this oath, a discharge cannot be granted (re *O'Farrell*, 2 B. R. 484; re *Quinike*, 4 B. R. 92). It is sufficient that this affidavit be produced and filed on the hearing (re *Sutherland*, 1 Deady, 573).

If the insolvent dies after taking the oath and the granting of the certificate, the Court has the power to order the discharge as on a date when the insolvent was in life (*Young v. Ridenbrough*, 11 B. R. 563).

56. The insolvent shall not be entitled to a confirmation of his discharge or of a deed of composition and discharge if it appears to the Court or judge that he has not obtained the assent of the proportion of his creditors in number and value required by this Act to grant such discharge or enter into such deed of composition and discharge, or that he has been guilty of any fraud or fraudulent preference within the meaning of this Act, or of fraud or evil practice in procuring the consent of the creditors to the discharge, or their execution of the deed of composition and discharge, as the case may be, or of fraudulent retention and concealment of some portion of his estate or effects, or of evasion, prevarication or false swearing upon examination as to his estate and effects; or that the insolvent has not kept an account book shewing his receipts and disbursements of cash, and such other books of account as are suitable for his trade, or that if, having at any time kept such book or books, he has refused to produce or deliver them to the assignee, or is wilfully in default to obey any provision of this Act or any order of the Court or judge; but in the Provinces of Ontario and Quebec, the omission to keep such books before the coming into force of the Insolvent Act of 1864, and in the Provinces of New Brunswick and Nova Scotia, such omission previous to the coming into force of the Insolvent Act of 1869, and in the Provinces of British Columbia, Prince Edward Island, or Manitoba, such omission previous to the coming into force of this Act, shall not be a sufficient ground for refusing the confirmation of the discharge of an insolvent:

And provided further that any act on the part of the insolvent, which might be held to be an act of fraud or fraudulent preference within the meaning of the Insolvent Act of 1864, or of 1869, or of this Act, but which would not amount to fraud if the said Acts or this Act had not been passed, shall not be a ground for refusing the confirmation of the discharge of any insolvent, if such act was done by the insolvent, in the Province of Ontario or Quebec, before the coming into force of the Insolvent Act of 1864, or in the Province of Nova Scotia or New Brunswick, before the coming into force of the Insolvent Act of 1869, or in the Province of British Columbia, Prince Edward Island, or Manitoba, before the coming into force of this Act.

It is doubtful whether gambling is a fraud within the meaning of the Statute. If it is desired to prohibit gambling as one of the frauds under the Act, it should be more specifically provided for. The only section which could by any possibility apply to it at present is the 130th. However, it is clear that gambling before the passing of the Act is not within its provisions (re *Jones*, 4 U. C. P. R. 317).

In the United States, it is held that property acquired in gaming is assets, and if the insolvent spend it in gaming he loses his right to a discharge. It is impossible to look into the mode in which such property as the Statute speaks of has been acquired. If property once in the possession of the insolvent has been spent in gaming, which if not so spent might be assets in insolvency, the case is made out. It is too late after it is spent to say that it was unlawfully acquired, or acquired in a particular way, or that creditors are no worse off on the whole (re *Marshall*, 4 B. R. 106; s. c. *Lowell*, 462); and if on the application for discharge the record of the insolvent's examination shows that he has, since the passing of the Act, lost money at gambling, the discharge must be refused (re *Wilkinson* 3 R. R. 286).

The insolvent is bound to pay over money, though received by him before the assignee is appointed (re *Warmington*, 4 L. C. L. J. 83).

The mere omission of property from the schedule is not evidence of a wilful concealment of it (*Steen v Aylesworth*, 18 Conn. 244). An omission to place property on the schedule because the insolvent concludes in good faith that it does not pass to the assignee is not a wilful concealment of it, where the law by which

it may be deemed to vest in him is doubtful and uncertain (*Rugely v. Robinson*, 19 Ala. 404).

The evidence to establish concealment must depend more or less on the circumstances of each particular case (*Petty v. Walker*, 10 Ala. 379).

It is concealment to leave out of the schedules property that has been conveyed by the insolvent in fraud of creditors. It is wholly immaterial that the title, as between vendor and vendee, vested in the vendee; as to creditors, the conveyance was void, and the title remained in the vendor (re *Rathbone*, 2 B. R. 260; re *Goodfellow*, 3 B. R. 452; *Peterson v. Spier*, 29 Penn. 478). The keeping of books from the assignee involves the question of intent. If the books were accidentally lost before the insolvency, there can have been no such concealment. If they were not lost, but within the control of the insolvent, and not given up on demand with intent to prevent the assignee from obtaining them, but their existence denied, the charge of concealment is sustained. It is not necessary that they should have been put in any unusual or out of the way place (*Hammond & Coolidge*, 3 B. R. 273).

The term "concealment" implies some thing wilful and intentional. One cannot be said to conceal property, unless he not only knows that he owns it, but, unless he also intentionally, not inadvertently, conceals the same from his assignee or creditors (re *Wyatt*, 2 B. R. 288; re *Wilson*, 6 Law Rep. 272); and an omission of property by accident or mistake, will not prevent a discharge (*Loud v. Pierce*, 25 Me. 233).

It will still be a concealment, if the assignee knows that it is concealed, if he does not know where it is concealed (re *Beal*, 2 B. R. 587). The concealment under this section embraces a concealment of title to property, as well as the hiding from view the property itself. In fact, the most dangerous sort of concealment, is when the debtor places the title to property in the hands of another person, to be held for his benefit, and conceals his beneficial right to it. Either kind of concealment will preclude the granting of a discharge (re *Husman*, 2 B. R. 437; *Edwards v. Gibbs*, 39 Miss. 166).

The neglect to keep proper books of account, is a most serious

breach of duty, and should be punished in a severe and exemplary manner (re *Lamb*, 4 U. C. P. R. 21 ; 3 U. C. L. J. N. S. 18).

But such neglect may not, under all circumstances, be an answer to an application for discharge. It is entirely within the discretion of the judge in insolvency, to determine what the penalty for neglect shall be in each particular case. Where the insolvent made an assignment in September, 1864, three months after the passing of the Act of that year, the Court considered the short period intervening between the passing of the Act and the application for discharge, and the inconsiderable nature of the business in which the insolvent was engaged, and held that the neglect to keep proper books of account, would be adequately punished, by the suspension of the discharge for a limited time, rather than by the absolute denial of the discharge altogether (re *Parr*, 17 C. P. U. C. 621).

If a firm has not kept proper books of account, a partner cannot obtain a discharge, although he was a junior member and not a keeper of the books (re *Pierson*, 10 B. R. 107). The creditor must take the burden of proof, and shew that the insolvent did not keep proper books of account (re *Banks*, 1 N. Y. Leg. Obs. 274). The intent of the non-keeping of books is of no importance. The mere omission is the thing plainly interdicted. Such omission prevents a discharge, whether the intent was fraudulent or not (re *Solomon*, 2 B. R. 285 ; re *Schumpert*, 8 B. R. 415). Whether the books of account are properly kept, is a question which must be decided in each case upon the facts as they appear, and not upon any strict rule that such and such books and such and such entries are essential in all cases (re *Perry*, 20 Pitts. L. J. 184). It is not necessary that the books be kept according to the forms taught in schools, or in ledgers, or in day books, bound in leather. In businesses of some kinds, any contemporaneous written memoranda, formal or informal, of a trader's transactions, whether in bound volume or in detached sheets, may answer the definition of proper books of account, if they have been preserved and so arranged as to present an intelligible and substantially complete exposition of his affairs. The question of what are proper books must, in each case, be a question of evidence. What



would be proper and sufficient books in one case would be improper and insufficient in another (re *Solomon*, 2 B. R. 285 ; re *Batchelder*, 3 B. R. 150).

It is not sufficient that the insolvent employed a book-keeper, whom he considered competent, and left the whole charge of the books to him. The law does not require traders to keep a book-keeper, but to keep books, and they are responsible to see that this is done (re *Hammond*, 3 B. R. 273). Entries upon numerous slips of paper, each entry being on a separate slip, is not a keeping of books, under the law (ib). A retailer who keeps the usual books and all his invoices, keeps proper books of account, although he kept no invoice book (re *Reed*, 12 B. R. 390).

There is no positive rule of law requiring the entries to be made daily, although they ought to be at or near the time of the transactions, or the balances to be made at any of the fixed periods, or the books to be kept in any particular way (re *George*, Lowell, 409). When the day book and the ledger, taken together, shew all the transactions of the insolvent, a discharge may be granted, although there are some meaningless mutilations in each (re *Pierson*, 10 B. R. 107).

A cash account is necessary to an understanding of a trader's business, and when one has not been kept, a discharge will be refused (re *Gay*, 2 B. R. 358 ; re *Belis*, 3 B. R. 496). The cash book should shew, in an intelligible and proper manner, the nature and character of the receipts and disbursements of cash made by the insolvent (re *Mackay*, 4 B. R. 67). The omission of an entire book or set of entries necessary to the understanding of the business prevents a discharge (re *White*, 2 B. R. 590). Careless omissions or mistakes, without fraud in books, themselves proper, may be overlooked (ib.).

An insolvent was largely indebted to several creditors and, on the application of one of them two months before his assignment, the insolvent transferred a large portion of his stock, consisting of the whole of his dry goods to such creditor. He kept no account of the goods so transferred, relying upon the creditor's promise to send him an account. He kept no books of account from the 1st of September, 1864, until his failure in the spring

of 1865, Jones, Co. J., expressed an opinion that the transfer of the stock in January, 1865, was a fraudulent preference, and such as would afford grounds, under the Act, for opposing the insolvent's discharge also that the neglect to keep books of account would have the same effect, and it appearing that during the same period some goods sent to another party were received by the insolvent and concealed, an order was made refusing the discharge absolutely (re *Beure* 3 U. C. L. J. N. S. 294; Jones, Co. J.).

The discharge of a debtor was refused, where it was proved that he had made fraudulent preferences and had traded extensively without capital, though it did not appear that the debtor had any intention of committing fraud (ex parte *Watt*, 2 L. C. L. J. 284).

A., an insolvent, within a few months previous to the time he stopped payment, made large purchases from several parties, and at the same time he was borrowing money outside of the banks, at from a half to one per cent. a week and was undoubtedly insolvent. He had made no balance sheet for two years previous to the suspension. It was held that the confirmation of the discharge could not be withheld on these grounds, in the absence of proof that he made the purchases knowing that he was insolvent and in contemplation of insolvency (re *Thurber*, 2 L. C. L. J. 129).

The insolvents, on the day previous to the issue of the writ of attachment, handed over to a clerk in their employ (who was their creditor for a large sum, and who was fully aware of their insolvent state for a year before,) a large quantity of negotiable paper, to be held as collateral security for an antecedent debt, with the intention of giving a preference over the other creditors; this was held such a fraudulent preference as to disentitle the insolvent to his discharge (ex parte *Tempest*, 11 L. C. J. 57).

The decisions on the subjects of fraud, and fraudulent preference, are collected under the sections of the Act from 130 to 133, particularly under the latter section. Pressure is material in determining whether there is a fraudulent preference, as it removes the voluntary character of the transaction. In Ontario, the decision in *Davidson v. Ross* (24 Grant, 22) has not altered the law as to fraudulent preference (see notes to section 133.)

It was held in re *Owens* (12 Grant, 560) that fraud in contract-

ing debts, before the passing of the Act of 1864, might be a ground for refusing a discharge under that Act.

By the latter part of this section, such a fraud would not now be a bar to an insolvent's discharge.

As we have seen the insolvent must have the majority in number, and three-fourths in value, of the proved claims. The necessity for this is clearly shewn by the section now under consideration. The amount of the claims cannot be increased by affidavit, filed on the application for confirmation of the discharge. But, if after the assignment, payments are admitted to have been made, these payments must be applied in reduction of the proved debts, and if they reduce the total debts below the three-fourths in value, the confirmation of the discharge must be refused (*re Lungs*, 4 U. C. L. J. N. S. 283 ; *Wilson*, Co. J.).

In this case, the learned judge held, that on the application for the confirmation of the discharge, he could not adjudicate upon the claims of the creditors, for the purpose of determining their amount, and that his jurisdiction was merely of an appellate nature (*re Cleghorn*, 1 U. C. L. J. N. S. 133 ; *re Stevenson*, 1 U. C. L. J. N. S. 52). The payments which reduced the amount of the debts in the schedule were admitted, and it is difficult to see why the reduction of the debts by the amounts paid, is not as much an adjudication as to their amounts, as their increase by affidavit would be ; and under the 95th section of the Act the judge has now original jurisdiction in the contestation of claims, and the above cited cases do not apply.

Under the 87th section<sup>1</sup> of the Act, the assignee has power to require, from any creditor, a supplementary oath, shewing the particulars of any payment received after proof of his claim.

In *re Noble* (2 *Revue Critique*, 63), decided in Halifax on the 13th of September, 1870, it was held that an insolvent could not claim a discharge from the Court when no estate, debts, or effects have passed by the assignment (see, however, *re Thomas*, 1 *Grant*, 196, ante p. 81-2).

57. The Court or judge, as the case may be, upon hearing the application for confirmation of such discharge, the objections thereto, and any evidence

adduced, shall have power to make an order either confirming the discharge or annulling the same according to the effect of the evidence so adduced. But if such evidence should be insufficient to sustain any of the grounds hereinbefore detailed as forming valid grounds for contesting such confirmation, but should nevertheless establish that the insolvent has been guilty of misconduct in the management of his business by extravagance in his expenses, recklessness in endorsing or becoming surety for others, continuing his trade unduly after he believed himself to be insolvent, incurring debts without a reasonable expectation of paying them (of which reasonable expectation the proof shall lie on him, if such debt was contracted within thirty days of the demand made of an assignant or for the issue of a writ of attachment), or negligence in keeping his books and accounts; or if such facts be alleged by any contestation praying for the suspension of the discharge of the insolvent, or for its classification as second class, the Court or judge may thereupon order the suspension of the operation of the discharge of the insolvent for a period not exceeding five years, or may declare the discharge to be of the second class, or both, according to the discretion of the Court or judge.

It was held undersubsection 12 of section 9 of the Act of 1864, that the judge, in granting the discharge of the insolvents, could not impose a condition which it was impossible for the insolvents to perform, and where, after an assignment, and the vesting of the entire estate of the insolvents in the assignee, the judge made an order, directing the insolvents to pay nine hundred and fifty-nine dollars to the assignee, the order was set aside (*re Wallis*, 29 Q. B. U. C. 313).

Where it appeared, on an application by an insolvent for his discharge under the Act of 1864, that he had, within three months before his assignment, paid one of his creditors in full, under such circumstances as was considered to amount to a fraudulent preference, and had neglected to keep proper cash books, or books of account suitable to his trade, and the judge in insolvency granted a discharge suspensively, to take effect four months after the order made; upon an appeal from this order by a creditor, the judge in chambers thought that the judge below had acted with extreme leniency; but acting on the principle that his decision should not be annulled except on a clear case, and to prevent an undoubted injustice, he refused to interfere with the order made (*re Lamb*, 4 U. C. P. R. 16).

The 58th section of the Act was repealed by the 40 Vict. s. 14.

59. A deed of composition and discharge may be made under this Act, either in consideration of a composition payable in cash, or on terms of credit, or partially for cash and partially on credit; and the payment of such composition may be secured or not according to the pleasure of the creditors signing it; and the discharge therein contained may be absolute, or may be conditional upon the condition of the composition being satisfied; but if such discharge be conditional upon the composition being paid, and the deed of composition and discharge therein contained should cease to have effect, the assignee shall immediately resume possession of the estate and effects of the insolvent, in the state and condition in which they shall then be, provided always that the title of any *bona fide* purchaser of any of the assets of the estate shall not be impaired or affected by this section: but the creditors holding claims which were provable before the execution of such deed, shall not rank, vote, or be computed as creditors concurrently with those who have acquired claims subsequent to the execution thereof, for any greater sum than the balance of composition remaining unpaid; but after such subsequent creditors have received dividends to the amount of their claims, then such original creditors shall have the right to rank for the entire balance of their original claims then remaining unpaid, and shall be held for all purposes for which the proportion of creditors in value require to be ascertained, to be creditors for the full amount of such last mentioned balance.

An insolvent compounded with his creditors, and had his goods restored to him. He, thereupon, resumed his business with the knowledge of his assignee and creditors, and contracted new debts. It was subsequently discovered that he had been guilty of a fraud which avoided his discharge, whereupon he absconded, and an attachment was sued out against him by his subsequent creditors. It was held that they were entitled to be paid out of his assets in priority to the former creditors. In such case, the assignee, as representing the former creditors, was ordered to pay the costs of a suit brought by the subsequent creditors to enforce their rights (*Buchanan v. Smith*, 17 Grant, 208; affirmed on rehearing, 18 Grant, 41). It will be observed that this case is merely an affirmation of the principle enforced by the above section.

It is an important question whether, after the acceptance of a particular composition, the creditors have power, where the circumstances of the debtor change afterwards, to reduce or modify the composition so as to bind dissentient creditors. By the English Act of 1869, s. 26, the creditors may add to or vary the terms

of any composition previously accepted by them under this Act. Creditors have power, by an extraordinary resolution, to reduce the amount of a composition previously accepted by them when the circumstances require it, and it will be for the benefit of the debtor and the creditors generally. A dissentient creditor is as much bound by such extraordinary resolution as he was by the resolution accepting the original composition (ex parte *Liquidator's R. I. Co.*; re *Glover*, 29 L. T. N. S. 694 L. R. 17 Eq. 121).

60. So soon as a deed of composition and discharge shall have been executed as aforesaid, it shall be the duty of the assignee to re-convey the estate to the insolvent; and the re-conveyance by the assignee to the insolvent or to any person for him, or whom he may appoint, of any part of his estate or effects, whether real or personal, if made in conformity with the terms of a valid deed of composition and discharge, shall have the same effect (except as the same may be otherwise agreed by the conditions of such deed or re-conveyance) as if such property had been sold by the assignee in the ordinary course, and after all the preliminary proceedings, notices and formalities herein required for such sale; and if such deed of composition and discharge be contested, and pending such contestation, the judge may suspend any payment or instalment of the composition falling due under the terms of such deed; and the deed of re-conveyance need not contain any further or more special description of the effects and property re-conveyed, than is required to be inserted in the deed of assignment, and may be enregistered in like manner and with like effect; and such deed may be executed before witnesses or before notaries, according to the exigency of the law of the place where such deed of composition and discharge is to be executed.

What is meant by being "executed as aforesaid" in this section?

Moss, J. A. in *McLaren and Chalmers*, 1 Appeal Reports, Ont. p. 71, expressed an opinion that after the execution of the deed and its deposit with the assignee, it was the duty of the latter to await its confirmation before re-conveying to the insolvents. This was probably meant to refer to its approval by the creditors under section 51 of the Act.

In this case the re-conveyance was made by the assignee, immediately after the deposit of the deed with him, and without calling a meeting for its consideration. This is, therefore, a decision that the deed is not executed within the meaning of this section when deposited with the assignee, and before the calling

of the meeting. The deed was signed by the necessary number of the joint creditors; but it is to be observed that there were separate creditors also, and the deed would be void in not providing for them. In England, after acceptance of a composition by the creditors, the debtor has a right to deal with the assets as he pleases. The creditors of a debtor resolved to accept a composition payable in three instalments, the third instalment being guaranteed by a surety. Before the resolution was passed the debtor had agreed with the surety to indemnify him against any liability which he might incur under his guarantee by depositing goods with him. This agreement was not made known to the creditors. After the resolutions were registered, the surety accepted bills of exchange for the amount of the third instalment of the composition, and certain goods were deposited with him by the debtor. The debtor paid the first instalment, but failed to pay the second, and thereupon he filed a liquidation petition. Afterwards the surety paid the third instalment. It was held that the agreement with the surety was valid, and that he was entitled to retain the goods as against the trustee under the liquidation (*ex parte Burrell*, L. R. 1 Ch. D. 537).

It seems that, under this section, no action can be maintained for any part of the composition pending the contestation of the deed of composition and discharge—at all events if the payment thereof is suspended by order of the judge. The ninety-sixth section of the Act of 1869 used language somewhat different from the present Act. It provided that “if such deed of composition and discharge be contested, and pending such contestation any payment or instalment of the composition falls due under the terms of such deed, the payment thereof *shall be postponed* till after the expiration of ten days after final judgment upon such contestation.” In a case under the Act of 1869, it appeared that the insolvent applied for the confirmation of his deed of composition and discharge, and the application was contested by one of the creditors. The contestation was dismissed by the Superior Court, but the creditor took out a writ of appeal from such dismissal. The dismissal was about three weeks after the plaintiff commenced an action on one of the composition notes he

had received, and at the time of the judgment of the Court the appeal was still pending. On the Statute being pleaded to the plaintiff's action, it was dismissed (*Yuile v. Munro*, 20 L. C. J. 25).

It is probable, however, that under the present Act the insolvent would be required, on contestation being made, to obtain an order from the judge suspending payment of the composition, and it would seem that no action could be brought after the making of such order.

61. The confirmation of the discharge of a debtor in the manner herein provided shall absolutely free and discharge him, after an assignment, or after his estate has been put in compulsory liquidation, by the issue of a writ of attachment, from all liabilities whatsoever (except such as are hereinafter specially excepted) existing against him and provable against his estate, whether the same be secured in part or in whole by any mortgage, hypothec, lien or collateral security of any kind or not, which are mentioned or set forth in the statement of his affairs exhibited at the first meeting of his creditors, or which are shown by any supplementary list of creditors furnished by the insolvent, previous to such discharge and in time to admit of the creditors therein mentioned obtaining the same dividend as other creditors upon his estate, or which appear by any claim subsequently furnished to the assignee; whether such debts be exigible or not at the time of his insolvency, or be contested in whole or in part, or be dependent on certain conditions or future contingency, and whether the liability for them be direct or indirect; and if the holder of any negotiable paper is unknown to the insolvent, the insertion of the particulars of such paper in such statement of affairs or supplementary list, with the declaration that the holder thereof is unknown to him, shall bring the debt represented by such paper, and the holder thereof, within the operation of this section.

It will be observed that, under this section, it is the confirmation of the debtor's discharge that relieves him from liability (see also section 66).

To effect a discharge, whether in the case of an assignment, or the issue of a writ of attachment, it is necessary that the creditor's claim should be in some way inserted in a schedule or supplementary list of creditors furnished to the assignee.

In the case of an attachment, it is immaterial that the means of making out a schedule are taken from the insolvent by seizure



of his books and papers. There would be a list of creditors prepared by the assignee, and on the examination of the insolvent, or at any other time up to the application for discharge, there would certainly be, in some shape or other, a list or schedule of creditors. The insolvent might, perhaps, adopt the schedule prepared by the assignee for the purpose of a dividend as his own, or frame his application for discharge, so that it refers to that as his schedule (*Pulmer v. Baker*, 22 C. P. U. C. 59).

This was a case of a writ of attachment. The same doctrine has been held applicable to an assignment.

Thus in *King v. Smith* (19 C. P. U. C. 319), the Court declared that, in order that the insolvent may be discharged from a particular debt, the creditor's name and the amount of his claim must be mentioned in the statement exhibited at the first meeting of creditors, or in some supplementary schedule of creditors; and, to a plea of discharge in the case of an assignment, it is a good replication that the plaintiff's name as a creditor, and the claim mentioned in the declaration were not mentioned in the statement exhibited at the first meeting of creditors, nor in any supplementary schedule, as required by law, and the debt was never proved against the estate (*King v. Smith*, 19 C. P. U. C. 319; followed in *Pulmer v. Baker*, 22 C. P. U. C. 59).

But the mere omission of the creditor's name from the schedule or statement will not prevent the insolvent from being discharged, in respect of the claim, if the claim is sufficiently identified in the schedule, and the creditor has notice of the assignment, and is required to prove his debt. Thus, where to an action of covenant on a mortgage to pay money, the defendant pleaded that, becoming insolvent after the execution of the mortgage, he made an assignment, that the plaintiff's claim was known as the "Wood Estate," and was so described in the schedule, submitted to the assignee and creditors, that plaintiff resided abroad, and was represented in Canada by M., who had notice of the appointment of said assignee, and that, after the lapse of a year, the defendant obtained his discharge; this was held a good answer to the action (*Farrell v. O'Neil*, 22 C. P. U. C. 31).

This case is distinguishable from *King v. Smith*, *supra*. In the

latter, neither the debt nor the creditor's name, nor anything to indicate the liability, was entered in the schedule. In *Farrell v. O'Neil*, the claim of the creditor was entered, but the name of the creditor holding the claim was not given; but the Court held the claim sufficiently identified without the creditor's name.

The plaintiff's knowledge of the insolvency proceedings seems to be immaterial in cases of this kind (see *Palmer v. Baker*, 22 C. P. U. C. 59).

The Statute will be substantially complied with if the debt is set out in such a manner as cannot mislead, provided there can be no reasonable doubt as to the debt referred to, and the amount thereof can be ascertained by the creditors. Where the creditor's name and residence, with a statement of the indebtedness of the insolvent (not specifying the amount), are inserted in the schedule it is not in all cases necessary that the precise amount should be shewn. Thus where the creditor was a solicitor, and the amount was stated "as and for a balance of costs in suits of A. against B., and B. against A." etc., it was held sufficient (*Cameron v. Holland*, 29 Q. B. U. C. 506).

If the name of the creditor and the amount of his claim are mis-stated in the schedule or statement of the insolvent's liabilities, the creditor's claim will not be barred. Thus, where the creditor's name was John James Robinson, and his address was Newcastle, and the amount of his claim \$552.25, it was held that his claim was not barred, by an entry in the schedule "John Robinson, Bond Head, judgment in suit, \$448," it appearing that he never received any notice of the insolvency proceedings (*Robson v. Warren*, 6 U. C. L. J. N. S. 14).

In a case of an attachment where no assignment has been executed, and the insolvent, not having obtained the consent of his creditors, applies for his discharge a year after the attachment, he ought to supply a list or schedule of creditors under the words in this section "which are shewn by any supplementary list of creditors furnished by the insolvent previous to such discharge" (*King v. Smith*, 19 C. P. U. C. 324). Where it appears that the creditor's name was put in the supplementary list of creditors, in time to permit of his receiving the same dividend as the other creditors,

his claim will be barred by the discharge (*Preston v. Hunton*, 37 Q. B. U. C. 177).

M. brought an action on a breach of warranty of a reaping machine, but suspended proceedings on hearing of the insolvency of the defendant.

After the defendant had procured the confirmation of a deed of composition executed by the majority in number and value of the creditors, M. proceeded with the action, and obtained a verdict, upon which judgment was entered and execution issued. After the recovery of the judgment, the insolvents filed a supplementary list of creditors, and gave notice thereof to the plaintiff, and tendered the compositions provided by the deed of composition and discharge, which M. refused to accept.

The Court held, reversing the decision of the judge in insolvency, that the judgment was not affected by the deed of composition and discharge, and the order restraining the execution was therefore vacated (re *McMillan*, 13 C. L. J. N. S. 105).

When judgment is obtained against an insolvent after the date of the assignment, but it is contested by the insolvent, and costs are incurred on the contestation, which is not concluded until long after a deed of composition is signed, the insolvent will not be discharged from these costs, though he has obtained a deed of composition and discharge, signed by the required number of creditors, duly confirmed by the Court (*Tate v. Charlebois* 14 L. C. J. 215). In this case the amount of the costs was not inserted in the schedule of liabilities, nor were they ascertained until after the deed was confirmed.

The discharge, under this section, will not bar debts contracted after the assignment, or the issue of the writ of attachment, but if the debt is due then it will be barred, though not actually payable. As a general rule, the liability to a discharge is co-extensive with the power to prove (see sec. 50).

The certificate of discharge is a bar only to debts and demands which were or might have been proved, but not as against personal covenants and engagements which were not provable. If a demand is not provable, it is not barred by the certificate (*Murray v. De Rottenham*, 6 Johns, Ch. 52). If the

debt is provable, the action is barred, although it was not actually proved (*Hardy v. Carter*, 8 Humph. 153).

Where, prior to the assignment, the insolvent had as grantor in a deed of conveyance to the plaintiff of a lot of land, entered into covenants for quiet enjoyment and for right to convey, and it appeared that, before the conveyance to the plaintiff was executed, the insolvent had mortgaged the land to another party, in whom the legal estate was vested, the Court held that the insolvent's covenants in the deed of conveyance were covenants in gross, as the legal estate did not pass to the plaintiff, that the damages in respect of the breach of these covenants must be assessed by a jury, and the claim for such damages was not provable under the Act, consequently the insolvent was not discharged therefrom. It was also held that the claim did not come within the 81st section as being "upon a contract dependent upon a condition or contingency," for the covenant was broken as soon as made, and before the assignment, therefore the condition was absolute before the insolvency (*Burrowes v. De Blaquiére*, 34 Q. B. U. C. 498).

In the United States, the Bankrupt Act expressly provides that a creditor proving his claim shall not be allowed to maintain any suit at law therefor against the bankrupt, but the suit may proceed if a discharge is refused. Under our Statute it would seem that the mere proof of a claim could not be pleaded in bar, or to the further maintenance of an action, and the Act would seem to afford no actual relief until a discharge is obtained.

In *Allan v. Garratt* (30 Q. B. U. C. 165) it was held that, where a deed of composition was ineffectual to bind non-assenting creditors, the mere fact of such a creditor proving his claim before the assignee did not prevent him from suing for the amount thereof.

It will be observed this section declares the claims will be barred whether secured in part or in whole, by any mortgage, hypothec, lien, or collateral security of any kind or not. If, therefore, a secured creditor does not come in and prove his claim against the estate, he must thereafter look to his security alone. If he allows the time for proof to go by, and the assets to be

distributed, he cannot, on his security proving insufficient, commence proceedings against the insolvent, assuming, of course, that the particulars of the secured claim are duly inserted in the schedule.

The 104th section of the Act of 1869 provided that the confirmation of the discharge, if not reversed in appeal, should render the discharge final and conclusive, but it was held that the confirmation of the deed, under this section, could not give it any greater effect than was provided for in the deed itself, or in the clause of the Act prescribing its effect. If the deed, for instance, was defective in not providing equally for all the creditors, or in ignoring the claim of any creditor, the confirmation by the judge will not remedy the defect (*Shaw v. Massie*, 21 C. P. U. C. 266).

It will be observed that this section authorises the insertion in the schedule of the particulars of negotiable paper, the holders of which are unknown.

If the debtor omits to insert the particulars required by the latter part of this section, the holder of a bill which has been negotiated, and who does not become aware of the debtor's insolvency until after the composition is accepted, will not be bound by it (ex parte *Matthews*, L. R. 10 Ch. App. 304 ; 32 L. T. N. S. 631).

It is important to consider whether the order of discharge absolutely releases and extinguishes the debt, so that a subsequent promise to pay it would be of no avail. Under the English Act the order "releases" the bankrupt from all debts provable under the bankruptcy, and if the word "release" be used in its technical sense, its effect would of course be not merely to bar the remedy but to extinguish the debt. In *Thompson v. Cohen* (L. R. 7 Q. B. 527, 532) Blackburn, J., says: "The word used is 'released' the debt is thereby gone." On the other hand, in some cases at least, an order of discharge is not equivalent to a release. For instance, it does not free a surety of the bankrupt from his liability (*Ellis v. Wilmot*, L. R. 10, Ex. 10).

In our Statute the words used are "shall absolutely free and discharge, &c.," and it has been held that an action might be

maintained on a note given for a debt barred by the discharge ; that the debt was still a continuing debt in conscience, and a sufficient consideration for a new promise (*Austin v. Gordon*, 32 Q. B. U. C. 621).

This case would probably not be regarded as an authority at present. It professed to follow the English cases, and since it was decided, the current of English authority has changed. Though the Act of 1869 in England does not contain any provision discharging the defendant from such a promise or note as the above, yet it is held that such a promise or note will not bind the bankrupt (*Heather v. Webb*, L. R. 2 C. P. D. 1 ; *Jones v. Phelps*, 20 W. R. 92 ; see also *Marshall v. King*, 31 L. T. N. S. 511 ; *Rimini v. Van Pragh*, L. R. 8 Q. B. 1).

In the United States the law is settled in accordance with the decision in *Austin v. Gordon*, supra (see the cases quoted in Bump's Bankruptcy, 9th Ed. 748).

62. A discharge under this Act, whether consented to by any creditor or not, shall not operate any change in the liability of any person secondarily liable to such creditor for the debts of the insolvent, either as drawer or endorser of negotiable paper, or as guarantor, surety or otherwise, nor of any partner or other person liable jointly or severally with the insolvent to such creditor for any debt ; nor shall it affect any mortgage, hypothec, lien or collateral security held by any creditor as security for any debt thereby discharged, without the consent of such creditor.

Under the English Bankruptcy Act a discharge releases only the debtor to whom it is granted, and leaves a co-debtor liable to be separately sued by a joint creditor (*Meyrath v. Gray*, 30 L. T. N. S. 16 ; L. R. 9 C. P. 216) ; and, under this section, partners or other persons liable jointly or severally with the insolvent are not discharged, and a plaintiff accepting a composition from one of three joint, and several makers of a note, will not release the others though aware, when taking the note, that the other makers were sureties only (*Fowler v. Perrin*, 16 C. P. U. C. 258 ; see also *Marten v. Brumell*, 4 P. R. U. C. 229 ; 4 U. C. L. J. N. S. 137).

Where the acceptor of a bill of exchange presents a petition for liquidation or composition under the English Act of 1869, and the creditors pass a resolution therefor, the acceptor must be consid-

ered as discharged by operation of law and the drawer is not thereby discharged from his liability. In such a case it makes no difference whether the bill-holder is present at the meeting or not, or whether he votes in favour of the resolution or against it (*ex parte Jacobs*, L. R. 10 Ch. App. 211; following *Megrath v. Gray*, L. R. 9 C. P. 216, and disapproving of *Wilson v. Lloyd*, L. R. 16 Eq. 60, which may be considered as over ruled so far as it relates to the release of a surety (see also *Glegg v. Gilbey*, L. R. 2 Q. B. D. 209).

And, where a surety on paying the debt may prove on the insolvent's estate in the place of the creditor, the surety is not released by the creditor consenting to the debtor's discharge (*Browne v. Carr*, 7 Bing. 508).

And the same rule applies in the case of liquidation by arrangement under section 125 of the Act of 1869. In such case, the surety still remains liable although the resolution granting the discharge contains no reservation of rights against sureties (*Ellis v. Wilmot*, L. R. 10 Ex. 10; see further on this section, *Buteman v. Gosling*, L. R. 7 C. P. 9; *Hooper v. Marshall*, L. R. 5 C. P. 4; *Cragoe v. Jones*, L. R. 8 Ex. 81).

After an assignment in insolvency, in 1875, a deed of composition and discharge was executed, by which the insolvent covenanted to pay thirty cents in the dollar, and give each creditor endorsed notes therefor, and the creditors, in consideration thereof, released him from all their respective claims, "saving and reserving the rights, which any of them may have against any other person, or in respect of any security held by them, or any of them." A. & Co., who were creditors executing the deed, had a claim amounting to \$2,758, for \$800 of which they held collateral security in respect of promissory notes, on which the insolvent was secondarily liable, all overdue, except one for \$52. It was held that A. & Co. were entitled to the composition on their claim, and to retain their securities, and were not bound to value their securities, the notes being overdue and unpaid (re *Stern*, 37 Q. B. U. C. 296).

This section only applies to the discharge in insolvency, and does not refer to, or have in view, any act of the parties effecting

a release of liability at law, or in equity (re *McDonald*, 14 B. R. 477). The creditor may still sue any one else liable upon the same debt in the capacities specified, and proceedings pending against others thereon, and unsatisfied judgments already obtained against others thereon, are not affected, discharged, or surrendered, by proving the debt (re *Levy*, 1 B. R. 327; *Payne v. Able*, 4 B. R. 220). When a firm, which has been dissolved by the death of one of the partners, is put into insolvency, by proceedings against the surviving partner, the discharge of the surviving partner will not operate to discharge the estate of the deceased partner from liability (re *Stevens*, 5 B. R. 112). The sureties upon an auctioneer's bond are not relieved, by the discharge of the principal, from liability for the proceeds of goods placed in his hands for sale (*Jones v. Russell*, 11 B. R. 478).

This section expressly provides, that the discharge shall not affect any mortgage, hypothec, lien, or collateral security, held by the creditor as security for any debt thereby discharged. This is merely a reservation to the secured creditor, of his rights in respect of the security, and does not, as we have seen under the preceding section, enable the secured creditor to attach the general assets of the insolvent, if he elects to look only to his security.

63. A discharge under this Act shall not apply without the express consent of the creditor, to any debt for enforcing the payment of which the imprisonment of the debtor is permitted by this Act, nor to any debt due as damages for assault or wilful injury to the person, seduction, libel, slander, or malicious arrest, nor for the maintenance of a parent, wife, or child, or as a penalty for any offence of which the insolvent has been convicted; nor shall any such discharge apply without such consent to any debt due as a balance of account due by the insolvent as assignee, tutor, curator, trustee, executor, or administrator under a will, or under any order of court, or as a public officer: nor shall debts to which a discharge under this Act does not apply, nor any privileged debts, nor the creditors thereof, be computed in ascertaining whether a sufficient proportion of the creditors of the insolvent have voted upon, done, or consented to any act, matter, or thing under this Act, but the creditor of any such debt may claim and accept a dividend thereon from the estate without being, by reason thereof, in any respect affected by any discharge obtained by the insolvent.

This section provides that the discharge will not bar the debts mentioned therein without the express consent of the creditor.



of the meeting. The deed was signed by the necessary number of the joint creditors; but it is to be observed that there were separate creditors also, and the deed would be void in not providing for them. In England, after acceptance of a composition by the creditors, the debtor has a right to deal with the assets as he pleases. The creditors of a debtor resolved to accept a composition payable in three instalments, the third instalment being guaranteed by a surety. Before the resolution was passed the debtor had agreed with the surety to indemnify him against any liability which he might incur under his guarantee by depositing goods with him. This agreement was not made known to the creditors. After the resolutions were registered, the surety accepted bills of exchange for the amount of the third instalment of the composition, and certain goods were deposited with him by the debtor. The debtor paid the first instalment, but failed to pay the second, and thereupon he filed a liquidation petition. Afterwards the surety paid the third instalment. It was held that the agreement with the surety was valid, and that he was entitled to retain the goods as against the trustee under the liquidation (ex parte *Buriell*, L. R. 1 Ch. D. 537).

It seems that, under this section, no action can be maintained for any part of the composition pending the contestation of the deed of composition and discharge—at all events if the payment thereof is suspended by order of the judge. The ninety-sixth section of the Act of 1869 used language somewhat different from the present Act. It provided that “if such deed of composition and discharge be contested, and pending such contestation any payment or instalment of the composition falls due under the terms of such deed, the payment thereof *shall be postponed* till after the expiration of ten days after final judgment upon such contestation.” In a case under the Act of 1869, it appeared that the insolvent applied for the confirmation of his deed of composition and discharge, and the application was contested by one of the creditors. The contestation was dismissed by the Superior Court, but the creditor took out a writ of appeal from such dismissal. The dismissal was about three *weeks* after the plaintiff commenced an action on one of the composition notes he

had received, and at the time of the judgment of the Court the appeal was still pending. On the Statute being pleaded to the plaintiff's action, it was dismissed (*Yuile v. Munro*, 20 L. C. J. 25).

It is probable, however, that under the present Act the insolvent would be required, on contestation being made, to obtain an order from the judge suspending payment of the composition, and it would seem that no action could be brought after the making of such order.

61. The confirmation of the discharge of a debtor in the manner herein provided shall absolutely free and discharge him, after an assignment, or after his estate has been put in compulsory liquidation, by the issue of a writ of attachment, from all liabilities whatsoever (except such as are hereinafter specially excepted) existing against him and provable against his estate, whether the same be secured in part or in whole by any mortgage, hypothec, lien or collateral security of any kind or not, which are mentioned or set forth in the statement of his affairs exhibited at the first meeting of his creditors, or which are shown by any supplementary list of creditors furnished by the insolvent, previous to such discharge and in time to admit of the creditors therein mentioned obtaining the same dividend as other creditors upon his estate, or which appear by any claim subsequently furnished to the assignee; whether such debts be exigible or not at the time of his insolvency, or be contested in whole or in part, or be dependent on certain conditions or future contingency, and whether the liability for them be direct or indirect; and if the holder of any negotiable paper is unknown to the insolvent, the insertion of the particulars of such paper in such statement of affairs or supplementary list, with the declaration that the holder thereof is unknown to him, shall bring the debt represented by such paper, and the holder thereof, within the operation of this section.

It will be observed that, under this section, it is the confirmation of the debtor's discharge that relieves him from liability (see also section 66).

To effect a discharge, whether in the case of an assignment, or the issue of a writ of attachment, it is necessary that the creditor's claim should be in some way inserted in a schedule or supplementary list of creditors furnished to the assignee.

In the case of an attachment, it is immaterial that the means of making out a schedule are taken from the insolvent by seizure



fiduciary capacity or character, and his discharge will not relieve him from liability for the proceeds of goods placed in his hands for sale (*Jones v. Russell*, 11 B. R. 478). A discharge does not relieve a guardian from his fiduciary obligations as such (*Carlin v. Carlin*, 8 Bush. 41; *Halliburton v. Carter*, 10 B. R. 359). An agreement by an executor guaranteeing the payment of a demand against the estate is not a debt created by him while acting in a fiduciary capacity. In making the promise, he acts outside of his character as executor, and he is not acting in a fiduciary character as respects the party to whom it is made (*Amoskeug M. Co. v. Barnes*, 49 N. H. 312). In reference to the debts mentioned in this section, it is to be observed that a judgment obtained before the insolvency changes the character of the debt, so that it will be barred by the discharge, whether the cause of action is for tort or a fiduciary debt (*Manning v. Keyes*, 9 R. I. 224; *Wolcot v. Hodge*, 81 Mass. 547). The judgment, however, would require to be before the assignment or the issue of the attachment (see notes to section 80).

64. If, after the expiration of one year from the date of an assignment made under this Act, or from the date of the issue of a writ of attachment thereunder, as the case may be, the insolvent has not obtained from the required proportion of his creditors a consent to his discharge, or the execution of a deed of composition and discharge, he may apply by petition to the Court or judge, to grant him his discharge, first giving notice of such application, (Form L) for one month in the Official Gazette, and also by letter or card postpaid, addressed, ten days before such application, by mail to each of his creditors whose claims amount to one hundred dollars or more, and may be affected by a discharge under this Act.

It will be observed, that under this section, the notice is only to be sent to those creditors whose claims amount to one hundred dollars or more. The 50rd section is silent on this point; but, in reference to both sections, the consideration is important, whether the creditors referred to are those who have proved.

This section provides, that the insolvent may apply by petition after the expiration of one year. If the application here intended is the presentation of the petition, then there is some doubt whether the notice could be given a month before the

expiration of the year. But probably the insolvent must wait the expiration of the year before giving notice in the *Gazette*, form L, and must then fix the day for the presentation of the petition one month later.

It has been held, in the Province of Quebec, under the Act of 1869, that where the insolvent applied for his discharge after the lapse of a year, it was incumbent on him to show that he had addressed and mailed notices to his creditors, under the 117th section of the Act, setting forth his intention to apply for a discharge (re *Esinhart*, 5 *Revue Legale* 436 ; ex parte *Poulin*, ib. 254).

This case would not now be an authority ; the words, " and all other notices required to be given by advertisement without special designation of the nature of such notices," in the 117th section of the Act of 1869, having been omitted in the present Act (see section 101). The contrary was held in Ontario (see re *Waddell*, 2 U. C. L. J. N. S. 242 ; in re *Starling*, 2 U. C. L. J. N. S. 303 ; see also re *Stark*, 18 L. C. J. 73 ; s. c. 18 L. C. J. 288). Now this section itself contains all the provisions in reference to the giving of notice ; the 101st section of the Act applying only to a meeting of creditors.

65. Upon such application, any creditor of the insolvent, or the assignee by authority of the creditors or of the inspectors, may appear and oppose the granting of such discharge upon any ground upon which the confirmation of a discharge may be opposed under this Act, or may claim the suspension or classification of the discharge or both ; and whether such application be contested or not, it shall be incumbent upon the insolvent to prove that he has in all respects conformed himself to the provisions of this Act ; and he shall submit himself to any order which the Court or judge may make, upon or without an application to that effect, to the end that he be examined touching his estate and effects, and his conduct and management of his affairs and business generally, and touching each and every detail and particular thereof ; and the Court or judge may also require from the assignee a report in writing upon the conduct of the insolvent and the state of his books and affairs before and at the date of his insolvency ; and thereupon the Court or judge, as the case may be, after hearing the insolvent and the opposant, if any, and any evidence that may be adduced, may make an order either granting the discharge of the insolvent or refusing it ; or in like manner and under the like circumstances to those in and upon which the discharge could be suspended or classified as hereinbefore provided, upon an

application to confirm it, an order may be made suspending it for a like period, or declaring it to be of the second class, or both.

Provided always that the judge shall not grant any discharge under this section in any case unless some one of the following conditions be established by proof, that is to say :

(1.) That a dividend of not less than fifty cents in the dollar on the unsecured claims has been or will be paid out of the insolvent's property ; or,

(2.) That such a dividend might have been paid but for the negligence or fraud of the assignee or inspectors, or,

(3.) That the insolvent had, on some one day prior to the institution of the proceedings in insolvency, mailed, prepaid and registered, to the address of each of his creditors so far as known to him, a declaration acknowledging his insolvency ; and that no proceedings in insolvency had been instituted against the insolvent for more than one month after the mailing of such notices ; and that such a dividend would have been paid but for circumstances for which the insolvent cannot justly be held responsible, arising more than one month after the mailing of such declaration (40 Vict. c. 16).

It may be observed, in reference to the proviso introduced by the late Act, that it does not apply to the case of a consent to a discharge or deed of composition. The majority in number and three-fourths in value of the creditors have still the right to accept, either by consent or deed of composition, any rate on the dollar which they think advisable, and the consent or deed will be confirmed by the judge. The object of this section is to meet cases where the insolvent is suspected of dishonesty, to give the creditors the power by refusing to sign a consent or deed of composition, to prevent altogether the discharge of the insolvent, where his estate does not pay fifty cents in the dollar. Sub-sections 1 and 2 of this section are borrowed from the forty-eighth section of the English Act of 1869. Sub-section 3 seems to have originated with our own Legislature. Voluntary assignments having been abolished, the power to acquaint the creditors with the state of the insolvent's affairs is necessary in the interests of justice. The Act says nothing as to the form of the declaration acknowledging insolvency, but probably any distinct written acknowledgment would be sufficient (see notes to section 3 (a)).

Although this section enables any creditor to oppose the discharge, it would seem that this must be taken to mean any credi-

tor who has proved a claim to the amount of one hundred dollars at least (see section 2, *h*).

Neglect of duty by the assignee is no reason for depriving a debtor of his discharge. Thus, though the assignee was required by section 10, s. s. 1, of the Act of 1864, to call a meeting, by advertisement, of the creditors for the public examination of the insolvent, yet if the other provisions of the Act were complied with by the insolvent, it was held that the judge could not refuse his discharge on the ground that the assignee had failed to call a meeting, as required by the section (re *Thomas*, 15 Grant, 196).

The report, in writing, which the Court or judge is empowered to call for from the assignee is entirely different from the certificate which the assignee is required to furnish under the 52nd section. The report would, it is conceived, show conformity, on the part of the insolvent, to the provisions of the Act, and the state of his books and affairs before and at the date of the insolvency.

An insolvent was ordered by a county judge to produce certain books and papers. These were at the time at Bruce Mines, and the insolvent did not feel called upon to go there for them, and an order was made *ex parte* for his committal for disobedience of the order. The insolvent had, however, in the meantime, taken the books to Montreal, and given them to one H. to hand to the assignee. He was then arrested, and subsequently applied for his discharge, which was refused. The books were afterwards handed over to the proper person, though in a mutilated condition, which mutilation, the insolvent said, must have been done at Montreal. He again applied for his discharge, on the ground that he had complied with the order, and that the imprisonment was for compulsory purposes only. The county judge, however, made an order refusing the application, and the insolvent then appealed from the last order to a judge in Chambers at Toronto.

It was urged that the warrant of arrest was insufficient on its face, that no demand was made of the books or refusal to give them shown, and, therefore, no contempt, and that the power of imprisonment was only to force compliance with the order, and

not *in pœnam*. The Court held, that the judge at Toronto had no right to enquire into the legality or propriety of the warrant for arrest, or as to the nature or object of the imprisonment authorized by the Statute, or whether the warrant was an order, and so an appealable matter under the Acts; that the last order of the county judge was not improperly made, and the appeal was merely an appeal from that order (*McInnes v. Davidson*, 4 P.R. U. C. 183; 4 U. C. L. J. N. S. 42).

66. Every discharge or confirmation of any discharge obtained by fraud or fraudulent preference, or by means of the consent of any creditor procured by the payment or promise of payment to such creditor of any valuable consideration for such consent, or by any fraudulent contrivance or practice whatever, tending to defeat the true intent and meaning of the provisions of this Act in that behalf, shall be null and void; and in no case shall a discharge have any effect unless and until it is confirmed by the Court or judge.

The 39 Vict. chap. 30, s. 14, added the words "or judge" to the end of this section. As to fraudulent preferences, see the notes to sections 130 & 133 inclusive.

If the execution of a deed of composition and discharge has been obtained by fraud, or fraudulent preference, or the concealment by the insolvent of a large portion of his assets, the deed may be set aside, and the creditors may sue for the full amount of their claims (*Girard v. Hall*, 1 L. C. L. J. 58), even though they have signed the deed of composition. And this may be done after confirmation, if the creditors seeking to set it aside had no knowledge of the fraud until after the time elapses for appealing from the order confirming the discharge. Thus where the insolvent, before the first meeting of his creditors, called under the Act of 1864, concealed a portion of his estate and effects with a view to defraud his creditors, it was held that the discharge was thereby avoided; and that it was not the less a fraud because the insolvent at the meeting had valued his assets at a sum sufficient to cover the goods so concealed (*McLean v. McLellan*. 29 Q. B. U. C. 548).

The 104th section of the Act of 1869 provided that the discharge, if not reversed in appeal, should be final and conclusive.

It has been held in Nova Scotia that the mere fact of a creditor not appealing from the order confirming the discharge did not prevent him from afterwards setting up that the discharge was obtained by fraud, in any action brought by him against the insolvent, where the latter pleaded the discharge (*Godkin v. Beech*, 1 Russell & Chesley Reps. N. S. 261). This seems to be the law where the fraud was unknown to the creditor when the order of confirmation was obtained (see *Thompson v. Rutherford*, 27 Q. B. U. C. 205 ; *McLean v. McLellan*, 29 Q. B. U. C. 548).

In an action on a promissory note, with a plea of discharge under the Act, and replication that the discharge was obtained by fraud, inasmuch as the defendant had concealed from the assignee certain promissory notes, it appeared from his own evidence that defendant, several months before his assignment, which was voluntary, desiring to raise money on his farm, one-fifth of which belonged to his wife, the value of her interest not being stated, gave his wife at least \$300 of notes, she otherwise refusing to consent to a mortgage of the farm. It further appeared that defendant had attempted to collect the notes, as he alleged, for his wife, and that the mortgage had been nearly paid off, but by what means was not shown. The Court held that the plaintiff was on this evidence entitled to recover (*Golloghy v. Graham*, 22 C.P. U. C. 226).

In order to render a deed of composition binding upon non-assenting creditors, the deed should be free from all taint of fraud, and should be entered into *bona fide*, with a view to the benefit of all the creditors. If the requisite number has been procured by some of the debtor's friends buying up claims on the estate at an exorbitant price, the deed will be void.

At the first meeting of creditors, a resolution in favour of a composition was lost. Subsequently the debtor's brother-in-law bought up one of the largest debts for 10s. in the pound. Under an order made on the debtor's application, a second first meeting of creditors was summoned, at which a proxy appointed by the creditor who had sold his debt, voted in favour of a composition of 2s. 6d. in the pound, and a resolution to that effect was carried. The Court held that the resolution was void, having been fraudu-



lently procured for the benefit of the debtor, and not with a view to the benefit of all the creditors (ex parte *Cobb*, 29 L. T. N. S. 123 ; L. R. 8 Ch. App. 727). It will be observed that this section invalidates a discharge or confirmation of discharge merely, and says nothing as to the validity or invalidity of any security or covenant made or given by the insolvent, to secure the consent of the creditor to the discharge, or as an inducement to the creditor to withdraw opposition to the same. Securities of this nature are void, on grounds of public policy, independently of the Statute. Thus a promise by the insolvent to pay a note, in consideration that the holder would withdraw his opposition to the maker's discharge as an insolvent, is illegal and void (*Austin v. Markham*, 10 B. R. 548), and such a note has been held void even in the hands of a *bona fide* holder (*Noble v. Scofield*, 44 Vt. 281).

It was held under the Act of 1869, that where the insolvent, in order to procure the consent of certain creditors to the deed of composition, gave them his promissory note for a sum in excess of what the deed secured to the other creditors, without the knowledge of and in fraud of the latter, the discharge was not effectual though confirmed by the judge, under the 104th section ; it not appearing that this fraud was known at the time of the application for confirmation (*Thompson v. Rutherford*, 27 Q. B. U. C. 205). The 104th section of the Act of 1869 provided that the confirmation of the discharge, if not reversed in appeal, would render the discharge thereby confirmed final and conclusive.

If the insolvent gives a creditor a note of a third person, in order to procure the consent of the creditor to his discharge, the note will be null and void. Such a note, made by the insolvent himself, would be null and void. In the case referred to, the note was made by the insolvent's mother, and the creditor never had any communication with her in regard to it (*Prévost v. Pickle*, 14 L. C. J. 220).

A note given by an insolvent to one of his creditors, for the purpose of obtaining his signature to a deed of composition, cannot serve as a ground of action against such insolvent, and the giving of such a note will be considered a fraud upon the other creditors. Parol evidence will not be admitted to prove that such

note was given after the signing of the deed of composition, nor to establish anything relating thereto, inconsistent with the terms of such deed of composition (*Sinclair v. Henderson*, 9 L. C. J. 306; 1 L. C. L. J. 54).

An agreement between a creditor and a third person, not the insolvent, to give the creditor an advantage over the other creditors, in the event of his not opposing the discharge, is invalid, and contrary to the policy of the insolvent law, the same being made without the knowledge and consent of the creditors of the insolvent, and for the purpose of giving the creditor a preference over the others (*McKewan v. Sanderson*, 27 L. T. N.S. 157).

If the insolvent induces the creditors to accept a much smaller composition than he is able to pay, by fraudulently concealing some portion of his estate, that would be a ground to avoid the discharge, but, in the absence of such fraud, there is nothing to prevent creditors agreeing to accept a smaller composition than the debtor, if hard pressed, might be able to pay (*Shaw v. Massie*, 21 C.P. U. C. 276.).

There must be good faith, and no secret bargain, for the benefit of any particular creditor, with the debtor or his friends, in order to induce the creditors to vote for a composition (ex parte *Cobb*, L. R. 8 Ch. App. 727.) The fact, however, that the creditors were partly influenced in voting for the composition, by good will towards the debtor, will not invalidate the deed (ex parte *Linsley*, L. R. 9 Ch. App. 290), unless there is *mala fides* on the part of the creditors, as where they resolved to accept a composition greatly less than the assets would pay (ex parte *Page*, L. R. 2 Ch. D. 323; see ex parte *Elworthy*, L. R. 20 Eq. 742).

Misrepresentation or concealment by the debtor of a material fact, will also invalidate the proceedings (ex parte *Burrell*, L. R. 1 Ch. D. 537).

Where G. & M., creditors, on the application of the insolvent, refused to execute a deed of composition and discharge, but subsequently consented to do so upon being called upon by the assignee, who, as an inducement, gave his own note to cover costs which they had incurred in endeavouring to recover the claim. The Court held, affirming the decision of the judge in insolvency,

that the deed was void, even although the action of the assignee was unauthorized by the insolvent (re *McCrae*, 13 C. L. J. N. S. 105).

Under the Act of 1869, the composition and discharge might be acted upon by the assignee before there had been any confirmation of the discharge by the judge, and it was not obligatory upon the insolvent to apply for a confirmation of the deed of composition and discharge, unless he chose to do so, or unless a creditor forced him to do so under the 102nd section, or unless opposition were made to the deed under the 97th section, and were not withdrawn. The effect of not having a confirmation was simply to throw upon the debtor, under the 104th section, the burden of proof of the discharge being completely effected under the provisions of the Act (*Nicholson v. Gunn*, 35 Q. B. U. C 11 ; per Wilson, J.).

It is apprehended that this section makes obligatory the confirmation of the discharge.

#### SALE OF DEBTS.

67. After having acted with due diligence in the collection of the debts, if the assignee finds there remain debts due, the attempt to collect which would be more onerous than beneficial to the estate, he shall report the same to the creditors or inspectors, and, with their sanction, he may sell the same by public auction, after such advertisement thereof as they may order ; and pending such advertisement, the assignee shall keep a list of the debts to be sold, open to inspection at his office, and shall also give free access to all documents and vouchers explanatory of such debts ; but all debts amounting to more than one hundred dollars shall be sold separately, except as herein otherwise provided.

It seems doubtful whether the assignee can legally sell debts—under this section, without having first made reasonable and *bona-fide* efforts to collect the same.

This section corresponds to the 44th section of the Act of 1869—It seems to differ from it only in this that, under the Act of 1869 the assignee could not sell the debts without first obtaining an order from the judge allowing the sale. Under this section, the sanction of the creditors or inspectors is all that is required. Under the Act of 1869, it was held that an assignee who sold out—

standing debts due to the insolvent, according to a schedule exhibiting the original amounts of such debts, without deduction of payments received by the assignee on account, was bound to account for and pay over to the purchaser of such debts the full amount of such payments so made to the assignee, notwithstanding that the conditions of sale declared "that the sale is made without any guarantee whatever, or any warranty of any kind or description whatever, so much so that no warranty is given that the debts have even existence;" and notwithstanding also, that the audience were informed by the auctioneer that dividends had been paid, and that the amounts in the schedule were the original amounts without deduction of payments; and notwithstanding also, that the total amount paid for such debts was only a few dollars, and the payments in question amounted to more than six hundred dollars (*Lafond v. Rankin*, 18 L. C. J. 62; 1 *Revue Critique*, 474).

68. If at any time any creditor of the insolvent desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the estate, and the assignee, under the authority of the creditors or of the inspectors, refuses or neglects to take such proceeding after being duly required so to do, such creditor shall have the right to obtain an order of the judge, authorizing him to take such proceeding in the name of the assignee, but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee as the judge may prescribe; and thereupon any benefit derived from such proceeding shall belong exclusively to the creditor instituting the same, for his benefit and that of any other creditor who may have joined him in causing the institution of such proceeding. But if, before such order is granted, the assignee shall signify to the judge his readiness to institute such proceeding for the benefit of the creditors, the order shall be made prescribing the time within which he shall do so, and in that case the advantage derived from such proceeding shall appertain to the estate.

It is presumed the only indemnity the creditor would be required to give, would be as to costs of the proceeding.

The 37th section, introduced into the Act of 1875 for the first time, follows the same principle as this.

69. The person who purchases a debt from the assignee, may sue for it in his own name, as effectually as the insolvent might have done, and as the assignee is hereby authorized to do; and a bill of sale (Form M), signed and

delivered to him by the assignee, shall be *prima facie* evidence of such purchase, without proof of the handwriting of the assignee, and the debt sold shall, in the Province of Quebec, vest in the purchaser without signification to the debtor; and no warranty, except as to the good faith of the assignee, shall be created by such sale and conveyance, not even that the debt is due.

The insolvent himself may be the purchaser (*Kitson v. Hardwick*, L. R. 7 C. P. 473; ex parte *Tinker*, L. R. 9 Ch. App. 716); and if the assignee assigns to the insolvent, debts owing to him, he will be entitled to sue for them in his own name (*Megarth v. Gray*, L. R. 9 C. P. 216); so also the assignee may sell the insolvent's share of the partnership assets to the insolvent's co-partners, if solvent, or any other person (re *Motion*, L. R. 9 Ch. App. 192).

#### LEASES.

70. If the insolvent holds under a lease, property having a value above and beyond the amount of any rent payable under such lease, the assignee shall make a report thereon to the judge, containing his estimate of the value to the estate of the leased property in excess of the rent; and thereupon the judge may order the rights of the insolvent in such leased premises to be sold separately, or to be included in the sale of the whole or part of the estate of the insolvent, after such notice of such sale as he shall see fit to order; and at the time and place appointed such lease shall be sold upon such conditions, as to the giving of security to the lessor, as the judge may order; and such sale shall be so made subject to the payment of the rent, to all the covenants and conditions contained in the lease, and to all legal obligations resulting from the lease; and all such covenants, conditions and obligations shall be binding upon the lessor and upon the purchaser, as if he had been himself lessee, and a party with the lessor to the lease.

Where there is a proviso in the lease for its forfeiture on insolvency, the term does not pass to the assignee in insolvency of the lessee.

It was provided by a lease that, in case the term should at any time be seized or taken in execution, or in attachment, by any creditor of the lessee, or if the lessee, becoming bankrupt or insolvent, should take the benefit of any Act that might be in force for bankrupt or insolvent debtors, the term should immediately become forfeited and void. Proceedings having been taken in compulsory liquidation, under the Insolvent Act of 1869, and an attachment placed in the hands of an assignee under the Act, who

entered in the usual way, and brought an action to recover possession of the demised premises, it was held that the lease was forfeited, and that the clause was not limited to an attachment under the absconding debtors' act (*Kerr v. Hastings*, 25 C. P. U. C. 429).

But, in the Province of Quebec, it was held that, the prohibitory clause contained in a lease, not to sublet nor transfer any portion of his lease without the written consent of the proprietor, did not apply to a sale in insolvency, under section 77 of the Act of 1869, which corresponded with this section (re *Wright*, 2 *Revue Critique*, 482).

Where a lease contains a covenant in the statutory form not to assign without leave, if the lessee make a voluntary assignment in insolvency his interest in the lease will pass to the assignee. It seems that the assignee has no right to decline the lease, and that no acceptance of the lease on his part, or election to take it, would be necessary. If any election were required on the part of the assignee, it would be sufficient if he entered on the premises and let a part of them to a third person (*Magee v. Rankin*, 29 Q. B. U. C. 257, *Doe. d.*, *Palmer v. Andrews*, 4 Bing, 348).

A covenant, on the part of a lessee, not to assign without leave, will be broken by a voluntary assignment in insolvency, and the lessor may maintain ejectment. In this respect it seems to differ from involuntary bankruptcy, where the interest passes by operation of law (see *Magee v. Rankin*, *supra*). In the latter case it would seem that the assignee would not be liable under a lease to the bankrupt until he accepts the term (*Copeland v. Stephens*, 1 B. & Ald. 593; *Mackley v. Pattenden*, 1 B. & S. 178).

Until the assignee elects to accept a lease as assignee, he does not become liable for rent accruing after the assignment (re *Teneyck*, 7 B.R. 26; re *Washburn*, 11 B. R. 66), and occupation of the premises, independently of the lease, is not evidence of an election to accept it (*ib.*). Merely allowing the insolvent's goods to remain on the premises, does not alone prove an acceptance of the lease; especially when the key is sent back to the lessor, which is an unequivocal act of renunciation (re *Yeaton*, *Lowell*, 20). A landlord has no lien on the goods on the premises for

the rent that accrues after the commencement of the proceedings in insolvency, for the debt is not provable (*Bailey v. Loeb*, 11 B. R. 271).

71. If the insolvent holds under a lease extending beyond the year current under its terms at the time of his insolvency, property which is not subject to the provisions of the last preceding section, or respecting which the judge does not make an order of sale, as therein provided, or which is not sold under such order, the creditors or inspectors shall decide at any meeting which may be held more than three months before the termination of the yearly term of the lease, current at the time of such meeting, whether the property so leased should be retained for the use of the estate, only up to the end of the then current yearly term, or, if the conditions of the lease permit of further extension, also up to the end of the next following yearly term thereof; and their decision shall be final. But if the first meeting of creditors is not held until within such period of three months, then the power of terminating the lease may be exercised by the creditors at such meeting, or by the inspectors, within one week thereafter, but not later (40 Vic. s. 16).

The 40 Vict. s. 16, amended this section by adding after the word "creditors" in the sixth line, the words "or inspectors," and by adding to the section the proviso given above.

If the assignee elects not to accept the lease the landlord ~~can~~ not prove for the damages suffered by him in reletting the ~~pre~~ premises. Future rent is not a contingent debt or liability. ~~There~~ is no right of action at the time of the insolvency, except for ~~the~~ arrears (ex parte *Houghton*, Lowell 554, see sections 72-3).

72. From and after the time fixed for the retention of the leased prop-~~erty~~ for the use of the estate, the lease shall be cancelled and shall from the ~~ce~~ forth be inoperative and null; and so soon as the resolution of the credi-~~tors~~ or inspectors as to such retention has been passed, such resolution sha-~~ll~~ be notified to the lessor, and if he contends that he will sustain any damage ~~by~~ the termination of the lease under such decision, he may make a claim ~~for~~ such damage, specifying the amount thereof under oath, in the same man-~~ner~~ as in ordinary claims upon the estate; and such claim may be conteste-~~d~~ in the same manner, and after similar investigation and with the same righ-~~t~~ of appeal, as is herein provided for in case of claims or dividends objected ~~to~~.

The 40 Vict. s. 17, amended this section by adding after ~~the~~ word "creditors" in the fourth line the words "or inspectors."

73. In making such claim, and in any adjudication thereupon, the measure

of damages shall be the difference between the value of the premises leased when the lease terminates under the resolution of the creditors, or inspectors, and the rent which the insolvent had agreed by the lease to pay during its continuance; and the chance of leasing or not leasing the premises again, for a like rent, shall not enter into the computation of such damages; and if the claim is not contested, or if, being contested, the damages are finally awarded to the lessor, he shall rank for the amount upon the estate as an ordinary creditor (40 Vict. s. 18).

74. The preferential lien of the landlord for rent in the Provinces of Ontario, New Brunswick, Nova Scotia, British Columbia, Prince Edward Island, or Manitoba, is restricted to the arrears of rent due during the period of six months last previous to the execution of a deed of assignment, or the issue of a writ of attachment under this Act, as the case may be, and from thence so long as the assignee shall retain the premises leased. In the Province of Quebec the preferential lien or privilege of the lessor shall be governed by the provisions of the Civil Code.

The 40 Vict. s. 19, amended this section by striking out the words "one year" in the fourth line and inserting in lieu thereof "six months."

The Statute of the Province of Ontario (37 Vict. chap. 10) provides that all rents, annuities, dividends and other periodical payments in the nature of income shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly; and the apportioned part shall be payable when the entire portion of which such apportioned part shall form part shall become due and payable and not before, and all persons shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable, as they would have had for recovering such entire portions as aforesaid if entitled thereto respectively.

It will be observed that, under this 74th section, the landlord's preferential lien continues so long as the assignee retains possession of the premises leased. The preferential lien of the landlord can only be obtained or realized by its operation as a lien on goods, and if there are no goods on the premises which can be distrained, the landlord has no advantage over other creditors; for, in cases of insolvency, the landlord has no privilege or preference for rent over any other claim, his only protection lies in his right to a preferen-



tial lien on property on the demised premises. The assignee cannot be ordered to pay the rent as a privileged claim without proof that he obtained goods which might have been distrained sufficient to pay the rent (re *Kennedy*, 36 Q. B. U. C. 471).

It would seem that a landlord cannot distrain upon the demised premises after the assignment, but must proceed under the 125th section of the Act. One M., in May, 1873, mortgaged land to defendants to secure payment of money by instalments and it was provided that, in case of default, the defendants might distrain. M. made an assignment under the Insolvent Act of 1869, and the plaintiff as his assignee entered on the land which was in M.'s possession and took possession of certain goods there belonging to him; afterwards an instalment on the mortgage being overdue, the defendants distrained therefor on these goods which were still upon the mortgaged premises. It was held that the defendant's only remedy was by application under the 50th section of the Act and that they had no right to distrain (*Munro v. Com. Bldg. & S. Society*, 36 Q. B. U. C. 464).

Prior to the decision in *Munro v. Com. Bldg. & S. Society* it was held that the landlord might distrain after the assignment, but if he did so he was restricted to one year's arrears of rent accrued due prior to the insolvency (*Griffith v. Brown*, 21 C. P. U. C. 12).

It did not improve the position of a landlord to distrain after the assignment, for whether he distrained or not his preferential lien for arrears of rent was required to be paid. If the landlord distrains before the assignment, and there is more than six months' arrears of rent then due, he is only, under this section, entitled to the six months' arrears. In other words, this section applies whether the distress is before or after the assignment (*Mason v. Hamilton*, 22 C. P. U. C. 411; reversing s. c. ib. 190).

In England, a landlord has always been entitled to distrain, not only after bankruptcy, but even after the messenger has taken possession (ex parte *Plummer*, 1 Atk. 103; *Briggs v. Sowry*, 8 M. & W. 729); but not after the removal of the goods (ex parte *Descharmes*, 1 Atk. 103); and it has been held, under the present Act in force in England, that he may distrain after the receiver has taken possession (re *Mayhew*, L. R. 16 Eq. 97). But the English

Act expressly enables the landlord to distrain "either before or after the commencement of the bankruptcy." But the landlord cannot distrain and prove for the same rent (ex parte *Grove*, 1 Atk. 104).

It has been held in the Province of New Brunswick, that a landlord may distrain on the goods of his tenant, although they are in the possession of a guardian in insolvency, under a writ in compulsory liquidation, and that there is nothing in the Insolvent Act taking away the common law remedy by distress in such a case (*McLeod v. McGuirk*, 2 Pugsley, 248). But this is contrary to the recent decision in Ontario already referred to.

A company which has statutory powers to recover money due to them "by the same means as a landlord, may recover rent in arrear" is a landlord within the meaning of the English Act (re *B. & S. Gas Co.*, L. R. 11 Eq. 615).

Where the Statute of 8 Anne, chap. 14, or similar statutory provision prevails, the landlord, by making a demand upon the assignee before the removal of the goods for an amount not exceeding a year's rent, is entitled to priority of payment, whether the right of distraining exists or not (re *Appold*, 1 B. R. 621; *Longsteth v. Pennock*, 20 Wall, 575; 12 B. R. 95).

If an execution is issued before the commencement of the proceedings in insolvency, the landlord is entitled to priority for the rent in arrear, although the levy was not made, nor notice of the rent given to the sheriff until after that time (*Barnes* appeal, 13 B. R. 543). Where a lease stipulates that all unpaid rent shall be a mortgage lien upon the property on the premises, it creates an equitable lien that is valid against the assignee (*McLean v. Klein*, 3 Dillon, 113). All right to priority under such a lease, which gives the landlord power to take possession of the property on the premises, is gone if the assignee takes possession before the landlord does (re *Dyke*, 9 B. R. 430).

No action lies against an assignee under the Insolvent Act to resiliate a lease made to the insolvent prior to his insolvency, on the ground that the premises are not garnished with sufficient movables to secure the rent (*Anderson v. Wurtele*, 2 *Revue Critique* 111).

75. The assignee may sell the real estate of the insolvent, but in any Province other than Quebec no sale shall be completed unless (a) the proposed sale has been sanctioned by the creditors at their first meeting, or at any subsequent meeting called for the purpose, or by the inspectors or (b) the assignee has advertised an auction sale or sale by tender, in accordance with the directions in that behalf given by the creditors at their first meeting or at any subsequent meeting called for the purpose, or by the inspectors, and the inspectors sanction, in writing, the acceptance of a price not greater than the amount bid, or tendered. In the Province of Quebec no sale of real estate shall be made unless after advertisement thereof, for a period of two months, and in the same manner as is required for the actual advertisement of sales of real estate by the sheriff in the district or place where such real estate is situate, and to such further extent as the assignee deems expedient ; provided that the period of advertisement may be shortened to not less than one month by the creditors with the approbation of the judge, but in the Province of Quebec such abridgment shall not take place without the consent of the hypothecary creditors upon such real estate, if any there be ; and if the price offered for any real estate at any public sale duly advertised as aforesaid is more than ten per cent. less than the value set upon it by a resolution of the creditors, or by the inspectors and the assignee, the sale may be adjourned for a period not exceeding one month, when, after such notice as the inspectors and the assignee may deem proper to give, the sale shall be continued, commencing at the last bid offered on the previous day when the property was put up at auction, and if no higher bid be then offered, the property shall be adjudged to the person who made such last bid : Provided that with the consent of the hypothecary and privileged creditors, or where there are no hypothecary or privileged creditors, with the approbation of the creditors or of the inspectors, the assignee may postpone the sale to such time as may be deemed most advantageous for the estate, and whenever the sale shall have been so postponed beyond one month, the last bidder shall be discharged from any obligation under the bid he may have made on the previous day when the property was offered for sale by auction (40 Vict. s. 20).

The 40 Vict. s. 20 has made a material difference in the mode of sale of real estate in all the Provinces except Quebec. Advertising the sale, as required by the former law, is dispensed with ; the sanction of the creditors being sufficient, if given at the first meeting, or at any subsequent meeting, called for the purpose, or the sale may be completed, if an auction sale or sale by tender, has been advertised in accordance with the direction of the creditors, and the price offered is equal to that which the inspectors sanction in writing. This section has effected a much needed re-

form in the Province of Ontario, as heavy expenses have heretofore been incurred in advertising the sale of real estate under the former law. Advertisements by assignees in insolvency, for the sale of property of the insolvent, should describe the property, and state the title with the distinctness required in equity, in the case of advertisement by trustees, and other officials (*O'Reilly v. Rose*, 18 Grant, 33; *McDonald v. Cameron*, 13 Grant, 84; *McDonald v. Gordon*, 1 Ch. Cham. 125; *McAlpine v. Young*, 2 ib. 177).

In Quebec, the sale of real estate by the sheriff, on execution, must be advertised in the *Official Gazette*, and in addition announced at the church door of the parish where the land lies (see Code, Civ. Pro. Art. 648). In Ontario, it is not now necessary to advertise the sale of real estate of the insolvent, in the same manner as required for the advertisement of the sale of the same on execution by the sheriff.

When the assignee varies the conditions of sale of real estate, and improperly refuses a bid, according to the conditions of sale, and adjudges the property to a previous bidder, the judge will set aside the adjudication, and order the property to be transferred to the party whose bid is rejected (*Parisien and Stewart*, 17 L. C. J. 84).

It is the duty of the Court, from the moment that the property is submitted to its custody, to take due order for its preservation, and to turn it to the best account for the creditors (re *Vila*, 5 Law Rep. 17). If a sale is made before the appointment of an assignee, it is necessary that the creditors should have due notice of the application before the sale takes place, so that they may appear in Court, and shew cause against any sale, or for a postponement thereof. The best mode of giving notice to the creditors is by advertisement in some public newspaper, a sufficient time before the sale, to enable them to act if they see fit (ib).

The solicitor of the assignee cannot purchase at a sale made by the assignee, for he is not the personal counsel of the assignee, but of the assignee as the representative of the creditors (*Citizen's Bank v. Ober*, 13 B. R. 328).

The insolvent may purchase property at an assignee's sale, (*Arnold v. Leonard*, 20 Miss. 258). If the right to property, and the

evidence to establish it, are' concealed from the assignee and the creditors, so that the assets are sold for a nominal amount to the insolvent himself, then the purchase is fraudulent, and may be set aside (*Clark v. Clark* 17 How, 315-322).

The purchaser at an assignee's sale is entitled to the rents from the day of sale (*Hall v. Scovil*, 10 B. R. 295).

But, he takes no higher right to the property than the insolvent himself had (*Anderson v. Miller*, 15 Miss. 586). The sale gives to the purchaser no other title than a sale by the insolvent himself before his insolvency would confer. If the insolvent could not give a legal title by his sale, the assignee cannot (*Camack v. Bisquay*, 18 Ala. 286).

76. All sales of real estate so made by the assignee shall vest in the purchasers all the legal and equitable estate of the insolvent therein, and the conveyance may be in the Form N ; but in the Province of Quebec, such sale shall in all respects have the same effect as to mortgages, hypothecs, or privileges then existing thereon, as if the same had been made by a sheriff under a writ of execution issued in the ordinary course, but shall have no other, greater, or less effect than such sheriff's sale : and in the Province of Quebec the title conveyed by such sale shall have equal validity with a title created by a sheriff's sale ; and the deed of such sale which the assignee executes (Form N,) shall, in the Province of Quebec, have the same effect as a sheriff's deed ; but the assignee may grant such terms of credit as he may deem expedient, and as may be approved of by the creditors, or by the inspectors, for any part of the purchase money ; except that no credit shall be given in the Province of Quebec for any part of the purchase money coming to any hypothecary or privileged creditor, without the consent of such creditor ; and the assignee shall be entitled to reserve a special hypothec or mortgage by the deed of sale as security for the payment of such part of the purchase money as shall be unpaid ; and such deed may be executed before witnesses or before notaries, according to the exigency of the law of the place where the real estate sold is situate.

Although this section declares, that the sale will vest in the purchaser, all the legal and equitable estate of the insolvent in the property sold, yet this must be understood to mean only such estate as passes to the assignee under the assignment, or the issue of the writ of attachment (see section 16 and notes thereon).

77. In the Province of Quebec, such sale may be made subject to all such charges and hypothecs as are permitted by the law of the said Province to

remain chargeable thereon when sold by the sheriff, and also subject to such other charges and hypothecs thereon, as are not due at the time of sale—the time of payment whereof shall not, however, be extended by the conditions of such sale; and also subject to such other charges and hypothecs as may be consented to in writing by the holders or creditors thereof.—And an order of re-sale for false bidding may be obtained from the judge by the assignee upon summary petition; and such re-sale may be proceeded with, after the same notices and advertisements, and with the same effect and consequences as to the false bidder and all others, and by means of similar proceedings as are provided in ordinary cases for such re-sales in all essential particulars, and as nearly as may be without being inconsistent with this Act. And as soon as immovables are sold by the assignee, he shall procure from the registrar of the registration division in which each immovable is situate, a certificate of the hypothecs charged upon such immovable, and registered up to the day of the issue of the writ of attachment, or of the execution of the deed of assignment, by which the estate of the insolvent was brought within the purview of this Act, as the case may be: And such certificate shall contain all the facts and circumstances required in the registrar's certificate obtained by the sheriff subsequent to the adjudication of an immovable in conformity with the provisions of the Code of Civil Procedure, and shall be made and charged for by the registrar in like manner: And the provisions of the said Code as to the collocation of hypothecary and privileged creditors, the necessity for and the filing of oppositions for payment, and the costs thereon, shall apply thereto under this Act as nearly as the nature of the case will admit: And the collocation and distribution of the moneys arising from such sale shall be made in the dividend sheet among the creditors having privileged or hypothecary claims thereon, after the collocation of such costs and expenses (including the assignee's commission on the amount of the sale), as were necessary to effect such sale or are incident thereto, in the same manner as to all the essential parts thereof, as the collocation and distribution of moneys arising from the sale of immovables are made in the appropriate Court in ordinary cases, except in so far as the same may be inconsistent with any provisions of this Act; but no portion of the general expenses incurred in the winding up of the estate shall be chargeable to or payable out of the said moneys, except on such balance as may remain after the payment of all privileged and hypothecary claims. The assignee's commission on such sale shall be the same as the poundage to which the sheriff is entitled on sales made by him. Any balance remaining after the collocation of the said necessary costs and expenses, and of the privileged and hypothecary claims, shall be added to and form part of the general assets of the estate.

The registrar's certificate must contain all hypothecs registered against the property, as soon as hypothecs shall be thus registered,

when the plan and book of reference shall be in force in the registration division, all hypothecs registered against the parties, who, during, the ten years previous to the sale, were owners of the immovable and all such anterior hypothecs as were registered anew during that period. It must also contain the date of the act registered as creating or evidencing such hypothec, the date of its registration, the names, occupation, and residence of the creditor, and the name of the notary or notaries before whom the act was passed. If it is notarial, it must specify, when several immovables are seized, which of them is affected by each hypothec, mentioning, as regards each hypothec, every partial payment registered and the amount in principal and preserved interest which appears to be due, and if the registration of a hypothec has been renewed, the certificate must mention both the registration and the renewal. But the registrar must not include hypothecs which appear by his books to have been extinguished or wholly discharged, and in searching for the hypothecs, the registrar must not go beyond the date of a sheriff's title, a sale in bankruptcy, or by forced licitation, or of any other sale having the effect of a sheriff's sale or of a judgment of confirmation of title, with regard to the immovable in question, and which has been registered, except as to hypothecs, which are not by such means discharged or extinguished. If there is no hypothec registered, or if all the hypothecs registered appear to have been extinguished or discharged, he must state so in his certificate. Art. 700 of the Code of Civil Procedure.

Creditors, whose rights are thus registered, need not file their claims to secure payment from the proceeds of the sale (Art. 719). But if such proceeds be wholly or partially insufficient to pay a claim, he can rank on the estate generally with the unsecured creditors, for the whole or any unpaid balance. Under the Code, oppositions for payment on claims, not registered, must be made within six days after the return of the sheriff to the Court, stating the amount in his hands from the sale, available for distribution (Art. 720). Under this it may, therefore, be presumed they should be filed within six days from the deposit of the purchase money with the assignee.

The opposition should state distinctly the nature of the claim,

with the dates and place and documents on titles in support of its pretensions.

By the code, the prothonotary must prepare a scheme of distribution between the sixth and twelfth day after the sheriff's return (Art. 724). Under this Act, it may be assumed it should be made by the assignee within twelve days from the payment by the purchaser.

In this sheet the name of each claimant must be inserted in numerical order, and the nature and amount of each claim, and whether it affects the whole or a part of the property (ib. ; Art. 726).

The moneys must be divided and paid in the following order :

I. The law costs in selling the property, &c. (art. 788).

II. The mortgages, according to the date of registration.

III. Non-registered claims *pro rata*, according to the provisions of this Act.

A separate dividend must be prepared of the proceeds of each piece of property (*Larivière v. Whyte*, 11 L. C. J. 265 ; *Wotherpoon's Ins. Act*, 134-135).

78. In the Province of Quebec any privileged or hypothecary creditor, whose claim is actually due and payable, shall have the right to obtain from the judge an order on the assignee to proceed without delay to the sale in the mode above prescribed, of any property real or personal which is subject to his privileged or hypothecary claim, and such creditor may also one month after the sale has taken place or one month after the assignee has received the price thereof, if not paid at the time of the sale, obtain an order from the judge to compel the assignee to make a dividend of the proceeds of such sale.

#### DIVIDENDS.

79. Upon the expiration of the period of one month from the first meeting of the creditors, or as soon as may be after the expiration of such period, and afterwards from time to time at intervals of not more than three months, the assignee shall prepare and keep constantly accessible to the creditors, accounts and statements of his doings as such assignee, and of the position of the estate ; and he shall prepare dividends of the estate of the insolvent whenever the amount of money in his hands will justify a division thereof, and also whenever he is required by the inspectors, or ordered by the judge to do so.



We have seen, under the fifty-third section, that the confirmation of discharge cannot be applied for before the day on which a dividend may be declared under the Act.

The wording of the Act of 1869 was slightly different from this section. The period was the expiration of one month from the first insertion of the advertisement, giving notice of the appointment of an assignee. The assignee was not required to prepare dividend sheets when the funds would justify it or when required by the inspector or ordered by the judge. Under the Act of 1869, the assignee might declare a dividend at any time within one month after his appointment and thereafter at intervals of not more than three months (re *Tucker*, 7 C. L. J. N. S. 326).

In view of the provisions of the 94th section it would seem that the assignee should not prepare the dividend sheet with reference only to the claims then proved against the estate.

If the assignee employs an attorney who renders legal services for him, the bill of the attorney therefor should be presented by assignee as part of his account. The intention is that the disbursements of the assignee in administering, whether only incurred and not yet paid or whether incurred and paid, shall be submitted to the creditors (re *Hubbell*, 9 B. R. 523).

80. All debts due and payable by the insolvent at the time of the execution of a deed of assignment, or at the time of the issue of the writ of attachment under this Act, and all debts due but not then actually payable, subject to rebate of interest, shall have the right to rank upon the estate of the insolvent; and any person then being, as surety or otherwise, liable for any debt of the insolvent, and who subsequently pays such debt, shall thereafter stand in the place of the original creditor, if such creditor has proved his claim on such debt; or if he has not proved, such person shall be entitled to prove against and rank upon the estate for such debt to the same extent and with the same effect as the creditor might have done.

A creditor cannot rank against the estate of an insolvent firm of which he is himself a member, but if not actually in partnership with the insolvent he may rank.

Randolph & Brother were lumber merchants, and carried on a grocery store and blacksmith's shop, for the convenience of the men engaged in their mill. Peckham & Hoag received consign-

ments of lumber from Randolph & Brother, and accepted their drafts drawn against such consignments. P. & H. were paid one-half of the net profits of the business, by way of commission. No provision was made in case of a loss, but by a special agreement, P. & H. shared half a loss which occurred in one year. P. & H. had access to the Randolph's books, and the yearly balancing was done under their supervision. One purchase of timber was made in the joint names of the Randolphs and a member of the firm of P. & H., the cash having been advanced by the Randolphs alone. Subsequently the Randolphs dissolved. The business was carried on by Randolph, the insolvent, and it was agreed between him and P. & H., that they should receive half the profits of the business, instead of a commission, as formerly, and the amount due P. & H. at the time, was carried to the debit of R.

P. & H. claimed as creditors of the insolvent's estate, for a balance due them. Their claim was resisted by the inspectors, on the ground that a partnership existed between them and the insolvent. The Court held, affirming the judgment of the County Court, that P. & H. were not partners of the insolvent and might therefore rank on the estate (*re Randolph*, 13 C. L. J. N. S. 83).

When a creditor seeks to prove a debt against the estate of a bankrupt, he stands in the position of a plaintiff in a suit at law seeking to enforce such claim (*re Prescott*, 9 B. R. 385); and the assignee may set up any defence to the claim which the debtor himself could set up (*ib.*).

The word debts used in this section must mean debts which the insolvent owes, as indorser, guarantor or surety as well as principal debtor. Though this section does not expressly provide this, yet section 2 (h) declares that the word "creditor" shall mean every person to whom the insolvent is liable, whether primarily or secondarily, and whether as principal or surety, and if a creditor may be such in respect of a secondary liability it necessarily follows that there may be an insolvent in respect of a secondary liability. But independently of this section it seems that section 81 would apply to the case, where the insolvent is a surety the

happening of the contingency would be non-payment by the principal.

In the United States it is held that a claim against an insolvent as drawer, indorser, surety, bail or guarantor cannot be proved before the liability has become fixed; until that time it is not regarded as a debt due and payable or even as a debt existing, but not payable until a future day so as to be provable (re *Loder* 4 B. R. 190). But when an indorser's liability has become fixed, such liability constitutes a debt due and payable from him and may be proved against his estate (re *Nickodemus*, 3 B. R. 230).

As between co-sureties, no claim exists until payment has been made upon the debt by one of them. There is no existing liability from one surety to the other until that event. If the payment is not made until after the final dividend, there is no claim contingent or otherwise which can be proved (*Swain v. Barber* 29 Vt. 292).

The latter part of this section applies to insolvency proceedings, a principle enforced by the Statutes of Canada 26 Vict. chap. 45, as to the Province of Ontario and the 23 Vict. chap. 31 as to New Brunswick. Under these Statutes any person who, being surety for the debt or duty of another, or being liable with another for any debt or duty shall pay such debt or perform such duty shall be entitled to stand in the place of the creditor and to use all the remedies and, if need be, and on proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity in order to obtain from the principal debtor or any co-surety or co-contractor indemnification for the advances made and loss sustained by the person who has paid such debt or performed such duty.

Under the latter part of this section, any person who is surety for the insolvent's debt at the time of the assignment may pay the debt after the assignment and be permitted to rank (*Hardy v. Carter*, 8 Humph. 153). Actual payment by the surety seems to be necessary to enable him to rank.

If the creditor has proved the claim, the surety may apply to the Court for an order that the proof shall stand for his benefit.

to the extent of the payment made by him thereon (*Downing v Traders' Bank*, 11 B. R. 371).

The debt must be satisfied by the payment of it. An arrangement dispensing with the actual payment, as by the substitution of a new security in which the surety joins and which in fact amounts to the creation of a new suretyship, will not do (*ex parte Sergeant*, 1 G. & J. 183). But where the surety in a bond gave, without the knowledge of the debtor, his promissory note to the creditor, and the latter gave the bond to the surety who paid the promissory note, the right of the surety to prove under the bankruptcy of the debtor was held to be unaffected (*ex parte Allen*, 3 De. G. & J. 447).

A surety who pays the principal creditor is only entitled to the same amount of proof as the latter would have been entitled to. If therefore the surety pays the debt with interest, subsequent to the bankruptcy, he cannot prove such subsequent interest because, according to the rule in bankruptcy, interest for the purpose of proof stops at the bankruptcy (*ex parte Wilson*, 1 Rose, 137; *Robson*, 3rd Ed. 266 et seq.).

There is no provision similar to the latter part of this section in the Bankruptcy Act at present in force in England. But the Bankruptcy Act of 1849 (section 173) contained a provision so closely analogous to this that it is conceived the decisions thereunder will apply to our Statute. That Statute provided that any person who, at the time of filing the petition, should be surety, or liable for any debt of the bankrupt, if he should have paid the debt, or any part thereof, in discharge of the whole debt (although he might have paid the same after the filing of the petition), if the creditor should have proved his debt under the bankruptcy, should be entitled to stand in the place of the creditor as to dividends, or if the creditor should not have proved that the surety should be entitled to prove his demand in respect of such payment as a debt under the bankruptcy. Under this Statute it was held that any person who had made himself legally or equitably liable to pay the debt of another, although not strictly a surety, was a person liable within the Statute (*ex parte Barrett*, 34 L. J. Bank. 111). Therefore, a person who ac-

cepted, drew, or indorsed a bill of exchange for the accommodation of another, was held to be a person liable within this section (ex parte *Young*, 2 Rose, 40). So, also, was a partner who retired under an agreement that the continuing partners should pay and indemnify him from the partnership debts (*Wood v. Dodgson*, 2 M. & S, 195). A surety in a bond to the Crown was also held to be a person liable within the section (*Westcott v. Hodges*, 5 B. & Ald. 12). But it was held that in order to bring a person within it he must be under a personal obligation to pay, and, therefore, when the goods of a sub-lessee were distrained by the superior landlord for rent payable by the mesne lessee, and from which the latter had agreed to indemnify the sub-lessee, the latter not being under a personal obligation to pay the rent, was held not to be a person liable within the section (*Hoare v. White*, 3 Jur. N. S. 445).

It was held, also, that the surety must be liable for a debt actually owing by the bankrupt at the time of filing the petition for adjudication, and that liability for a debt accruing afterwards or a mere contingent liability, was not sufficient (ex parte *Hansen*, 1 Rose, 157; ex parte *Houston*, 2 G. & J. 36).

The whole of the debt must be discharged either by payment in full, or of part, in satisfaction of the whole, before the surety can claim to stand in the creditor's place, or to prove (ex parte *Sergeant*, 2 G. & J. 23). But the surety himself need not pay the entire debt, or part, in satisfaction of the whole, provided the whole is paid or satisfied. If the surety pays all which the insolvent debtor or his estate has not paid, it will be a payment in respect of which the surety's right of proof will arise (ex parte *Johnson*, 4 D. M. & G. 218). Therefore, if the surety pays the whole debt he will be entitled to prove for the whole, or to the full benefit of the creditor's proof (ex parte *Brook*, 2 Rose, 334); and if the surety pays all that remains due he will be entitled to stand in the creditors' place as to future dividends on the full amount of the creditor's proof until he is fully repaid (ex parte *Johnson*, supra).

Where the creditor's demand exceeds the amount guaranteed by the surety, the creditor cannot, after the payment to him by

the surety of the amount guaranteed, apply the whole dividend on his own proof in reduction of that part of the debt which was not covered by the guarantee, but the dividend must be apportioned for the benefit of the surety, and the portion of the dividend payable in respect of the sum paid by the surety must be paid over to him by the surety (ex parte *Rushforth*, 10 Ves. 409; *Hobson v. Bass*, L. R. 6 Ch. App. 792). The right of the surety, however, to share the dividend with the creditor may be excluded by special contract (ex parte *Hope*, 3 M. D. & D. 720; *Midland B. Co. v. Chambers*, L. R. 7 Eq. 179).

Although a creditor of an insolvent indorser or drawer of a bill of exchange may prove against him in respect of his secondary liability, yet, if the insolvent would have been entitled to notice of dishonour of the bill or note, if he had not become insolvent, the creditor cannot prove if he has not given the insolvent a sufficient notice of dishonour. In the case of a foreign bill it would be sufficient to give notice that it had been presented for payment and dishonoured without stating that it had been protested by a notary (ex parte *Lowenthal*, L. R. 9 Ch. App. 591; 30 L. T. N. S. 668). The same rules as to the time and mode of giving notice of dishonour and as to what constitutes due diligence, and under what circumstances absence of notice is excused would seem to apply in the the case of insolvency as when no insolvency has occurred (*Gladwell v. Turner*, L. R. 5 Ex. 59; Byles on Bills, 9th Ed. 263).

In proving on a cheque, it is not necessary to present it or give notice of dishonour where the drawer can sustain no injury by the omission to do so, and the holder of unpaid cheques drawn by the insolvent may rank on the insolvent estate, although he has not presented the cheques or given notice of dishonour, provided there was no funds of the drawer in the banker's hands from the time the cheques were drawn to the filing of the claim. A party contesting a claim on the ground of the non-presentment of the cheques must show that the drawer sustained some loss or injury thereby (re *Oulton*, 2 Pugsley, 333).

To charge the insolvent as indorser upon a note payable on demand, the note must be presented for payment within a rea-

sonable time. A demand after the lapse of more than four years is not sufficient (re *Crawford*, 5 B. R. 301).

The holder of a bill of exchange or note will also forfeit his right to prove against the drawer or indorser if without his consent, or, if he is insolvent, the consent of his assignee, he gives time to the acceptor or maker, except in the case of a mere accommodation bill or note, as between the insolvent and the person to whom time is given (*Oriental F. C. v. Overend*, L. R. 7 Ch. App. 142; *Latham v. Chartered Bank of India*, L. R. 17 Eq. 205).

Under the eighty-fourth section, as we shall hereafter see, a creditor holding a bill or note on which some person, other than the insolvent, is primarily liable, is considered a secured creditor within that section, and must, in proving against the insolvent indorser, put a value on the security of the party primarily liable thereon.

As the law is interpreted in the United States, no interest runs after the adjudication. If the debt exists at that time, but is not payable till afterwards, and is not a debt running with interest, there must be a rebate from its amount of the interest on that amount from the time of adjudication till the time when it would be payable. If it exists, but is payable before that time, and bears interest, the Statute intends that the debt shall be proved for the amount of the principal, and of the interest thereon, to the time of the adjudication (re *Orne*, 1 B. R. 57; re *Port Huron D. D. Co.*, 14 B. R. 253; re *Bugbee*, 9 B. R. 258). The Statute there speaks of all debts then existing, but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract. In England it has been very recently held that a secured creditor cannot claim interest after adjudication (re *Higgs*, 62 Law Times, 336, following re *Savin*, L. R. 7 Ch. App. 760). And in calculating the rebate of interest, under this section, the time of the execution of the assignment or the issue of the writ of attachment is to govern.

Where the estate of the insolvent is sufficient to pay in full, and a surplus remains, interest must be allowed on all debts

proved in the insolvency proceedings where the debt by express contract or by Statute bears interest, or where a contract to pay it is implied, but on no other debts will interest be allowed (re *Langstaff*, 2 Grant, 165).

A wife may prove against her husband's estate for money lent by her to him prior to the insolvency. The mere fact that the claimant is the wife of the insolvent should not debar her from proving against the insolvent's estate, if the circumstances are such that a third party might make proof (re *Dangerfield*, 13 C. L. J. N. S. 42; McDonald, J. J.).

So in the United States it is held that money loaned by the wife of the insolvent to him out of her separate estate is a claim that may be proved. While the law regards claims of this character with great distrust, equity will protect the rights of the wife, even against the creditors of the husband. The Court being satisfied that the money was the separate property of the wife, and was placed in the husband's hands as a loan or trust for the benefit and use of the wife, and not as a gift, will adjudge him to be her debtor to that amount, and will award payment to her as to any other creditor (re *Bigelow*, 2 B. R. 556; re *Jones*, 9 B. R. 56).

A married woman transferred certain shares which formed part of her separate estate, to her husband, upon a promise of repayment by him of their value. It was held in insolvency proceedings against the husband, that she was entitled to rank on his estate as a creditor, but that such claim should be submitted to the most rigid investigation, and must be supported by the most clear and convincing evidence when being proved before the assignee (*Miller v. Hewitt*, in the Court of Appeal, Ontario, 13 C. L. J. N. S. 85).

B., a trader, in 1857, went through the ceremony of marriage with M., a sister of his deceased wife, and thenceforth lived with her as his wife. In 1858 a sum of £2,000, which came to her under the will of her father, was by her direction paid to B, to be employed by him in his business, it being at the same time agreed that B. should be trustee of the £2,000 for M., and that a settlement should be executed to carry out the agreement. In 1876, B.



filed a liquidation petition—no settlement of the £2,000 had been executed. It was held that M. was not entitled to prove in the liquidation for the £2,000 in competition with the creditors of the business, and that no proof could be admitted in respect of a trust inconsistent with the application of the money which the lender pointed out (*re Beale*, L. R. 4 Ch. D. 246).

In the Province of Quebec, the wife of the insolvent may claim for her dower, though only payable at the death of her husband, subject of course to a rebate on the valuation (*Morrison v. Thomas*, 15 L. C. J. 166).

The right of proof under a bankruptcy in England does not depend upon the law of the place where the contract was made, but on the law of England. Thus where, by reason of want of registration, a marriage settlement whereby the husband secured a provision to the wife, was void as against the husband's creditors by the *lex loci contractus*, it was held that the husband, having become bankrupt in England, the wife might prove *pari passu* with the other creditors under his bankruptcy, the want of registration not affecting the validity of the contract (*ex parte Melbourn*, L. R. 6 Ch. App. 64).

Where a foreign creditor has obtained a judgment, and levied an execution upon the personal property of the bankrupt in such foreign country, after the commencement of such proceedings in bankruptcy, if he seeks to prove his claim he must first refund what he has so acquired, and come in equally with the rest of the creditors or not at all (*re Bugbee*, 9 B. R. 258).

A savings bank, which is prohibited from making loans on personal security, cannot prove a claim for money so loaned (*re Jay Cox*, 13 B. R. 122).

Debts contracted by an infant cannot, on his becoming insolvent after attaining his majority, be proved, except debts for necessities and liquidated damages for torts; but a debt contracted by an infant who fraudulently represents himself to be of age, would seem to be provable (*ex parte Unity Bank*, 3 De Gex. & J. 63).

In an action of detinue where the plaintiff had obtained a verdict for damages, in default of the defendant returning the goods to him, and, before he had issued execution, the defendant became

bankrupt, it was held that the trustee in bankruptcy being ready to give up the goods, the plaintiff could not prove as a creditor for the amount given by the verdict, since until execution should be issued the property in the goods remained in him (re *Scarth*, L. R. 10 Ch. 234).

The provisions in regard to what debts may be proved are arbitrary, but do not affect the existence or validity of such debts as are not provable, nor does a discharge release them. If a debt is provable, it comes in for a dividend, and can, unless it is an excepted debt, be discharged. If it is not provable it does not come in for a dividend, and will not be discharged (re *May*, 9 B. R. 419).

*Burrowes v. De Blaquiere* (34 Q. B. U. C. 498), establishes the proposition that debts not provable against the estate are not barred by the discharge; and a claim for unliquidated damages on a covenant in gross is not provable, the damages not being assessed by a jury (ib.).

The claims which may be proved are such as can be satisfied in money of an ascertained or easily ascertainable amount (*Johnson v. Skafte*, L. R. 4 Q. B. 700; ex parte *Wilmot*, L. R. 2 Ch. App. 795).

In other words, a creditor can only prove for a debt against the estate, and not for unliquidated damages. The insolvent, a miller, agreed to grind wheat for the claimants, and to deliver to them a barrel of flour of a specified quality for so many bushels of wheat. The claimants accordingly purchased wheat, and sent it to be ground under the agreement, and the insolvent bought wheat at the mill, and sent the claimants a statement of the amount bought in each case, and the claimants paid for it. Wheat was thus supplied to such an amount, that under the agreement, the insolvent became liable to deliver to the claimants 955 barrels of flour as the equivalent for the wheat received by him. It was held that, under this agreement, the wheat remained the property of the claimants, and the miller was only a bailee thereof, that such bailment was determined by the conversion of the wheat, so that the claimants might maintain trover for it either as wheat or as flour, if it was ground; that they might waive the right to bring

an action for the conversion, and sue for the value of the wheat according to the market price when delivered, or if the wheat had been converted into flour they might sue for its value at the market price, and as the price of the wheat in the one case or of the flour in the other could be easily ascertained with certainty, the claimants were entitled to prove for it (re *Williams*, 31 Q. B. U. C. 143).

The Court further held that a claim for compensation as to a certain number of barrels which turned out not to be of the quality agreed for was clearly a claim for unliquidated damages and could not be proved. In such a case as the above the claimant would be allowed to amend his claim so as to comprise the wheat or flour according to the facts.

A claim for damages for a purely personal injury is not provable unless liquidated and transmuted into a legal debt by a judgment obtained before the adjudication of bankruptcy (re *Hennocksburgh*, 7 B. R. 37). A mere verdict in an action for a personal tort is not a provable debt (*Black v. McClelland*, 12 B. R. 481). A judgment entered after the commencement of the proceedings in bankruptcy upon a verdict rendered before that time in an action for a personal tort is not a provable debt (ib.). A judgment for a fine imposed by law for the commission of a crime is not provable (re *Sutherland*, 3 B. R. 314). A judgment obtained for a breach of a promise to marry is provable (re *Sheehan*, 8 B. R. 345).

Demands founded on tort will be provable if, before the making of the assignment or the issue of the writ of attachment, the amount has been ascertained by a verdict and final judgment (ex parte *Hill*, 11 Ves. 646); or by a reference and award (ex parte *Harding*, 5 D. M. & G. 368); or by agreement (ex parte *Mumford*, 15 Ves. 289); and the creditor has not, before the verdict, judgment or award, notice of an act of bankruptcy available for adjudication against the debtor (*Robinson v. Vale*, 2 B. & C., 762). But on a verdict for damages in an action of tort, judgment must be signed before adjudication in order to make it provable under section 31 of the English Act. If judgment is not signed till after adjudication, even though the verdict is obtained before the

insolvent is not discharged from the liability (re *Newman*, L. R. 3 Ch. D. 494).

Under the English Act demands in the nature of unliquidated damages, arising otherwise than by reason of a contract or promise, are not provable, but, save as aforesaid, all debts and liabilities present or future, certain or contingent, shall rank on the estate. There it is held that a claim for costs is a provable debt although the costs have not been taxed at the date of the adjudication (re *Duffield*, L. R. 8 Ch. 682).

A creditor, who has obtained a verdict with costs in an action at law, but had been restrained by injunction from taking any further proceedings in the action, claimed to vote in respect of the aggregate amount of the damages recovered, and the estimated costs which had not been taxed, but it was held that this last was an unliquidated debt within the Act, and that, in order to vote, he ought either to have applied for leave to sign judgment and tax his costs, or else to have sworn to a sum to which the costs when taxed would at least amount (re *Dummelow*, L. R. 8 Ch. 997).

A breach of trust, although it would afford a good ground for an action in tort for unliquidated damages, has always been held to create a debt in equity, and, as such, is provable (ex parte *Green*, 2 D. & C. 113; re *White*, L. R. 9 Ch. 626).

Where there is one estate, there can in no case be two proofs on one debt, and this, even though there be separate contracts in respect of the same debt (re *Oriental Com. Bank*, L. R. 7 Ch. 99).

It must also be remembered that when a creditor proves under an English bankruptcy he cannot take the benefit of the English law without bringing into the common fund any part of the bankrupt estate, which he may have already received abroad (*Selkrigg v. Davis*, 2 Rose, 97; re *Douglas*, L. R. 7 Ch. 490).

In proceedings before the county court judge, a claim was put in by the mother of the insolvent, which the creditors opposed the allowance of, on the ground that the mother was indebted to the son in a greater amount than her claim, such claim being distinctly proved by the claimant, her husband and the insolvent.

The judge allowed the claim, from which allowance the inspectors of the estate appealed, and then sought to impeach the claim of the mother altogether, as being fraudulent—the only thing that could be suggested in opposition to the evidence stated, being the fact that the money said to have been deposited in the bank by the claimant was in gold, English sovereigns, which the Court **was asked to assume was so improbable and incredible, as to be evidence of fraud.** This, however, the Court refused to do; and on the ground that the judge, who saw the parties give their evidence, having thought the proof of the *bona fides* of the debt sufficiently established, had allowed the claim.

Proudfoot, V. C., agreed in the conclusion at which the judge had arrived, and dismissed the appeal with costs (re *Weeks*, 12 C. L. J. N. S. 147).

By an agreement between a debtor and one of his creditors, the latter agreed to accept, by way of composition, certain notes of the debtor, payable at specified dates, and it was provided that the debtor should also give his note for the whole debt, and that, if he were guilty of any default in paying the composition notes, the creditor should rank on his estate for the whole debt. The notes were given accordingly, the debtor made default, and afterwards was proceeded against under the Act. It was held that the stipulation as to the whole debt was not illegal, and that there having been default before insolvency the creditor was entitled to prove for the whole debt (re *McRae*, 15 Grant, 408).

The holder of a bill of exchange, or promissory note for valuable consideration, may prove for the amount against all the parties liable upon it, and he may prove against the estate of the insolvent drawer, or indorser, before the bill is dishonoured (*Starey v. Barns*, 7 East, 435; *Alsager v. Currie*, 12 M. & W. 751). The holder may also receive a dividend upon the amount of the bill or note from each of the estates against which he proves, until he receives one hundred cents on the dollar, and, if after proof he receives a dividend from other parties to the bill or note, that will not be deducted from the amount of his proof, and he will be entitled to receive a dividend on the full amount of the bill or note, until the debt is satisfied (ex parte *Cuma*, L. R. 9 Ch. App.

686; ex parte *Wildman*, 1 Atk. 109). If, however, at the time of proving, the creditor has received part of the debt, either in payment or as a dividend, on the bill or note from the estate of one of the other parties liable upon it, or even if such a dividend has been declared, though not actually paid (ex parte *Todd*, 2 Rose, 202); he will be allowed to prove for the residue only, after deducting the amount so paid or declared (ex parte *Leers*, 6 Ves. 644); so also if bills are taken in payment for goods, and negotiated by the vendor, and the holder proves under the insolvency of the purchaser, the vendor will not be allowed to prove against the same estate, as this would be a double proof for the same debt (ex parte *Alcott*, 21 W. R. 328; Robson, 3rd Ed. 217-8).

If bills are discounted in the market, which are drawn by one firm upon another firm, and then both these firms become bankrupt, the bill holder is entitled to prove against both estates, and to receive all the dividends he can get from both estates, until he has received one hundred cents on the dollar, and whether it may turn out that the drawer is surety for the acceptor, or the acceptor is surety for the drawer, yet the surety has no right to receive anything until the bill holder has received payment of his debt in full (ex parte *Turquand*, L. R. 3 Ch. D. 445. Bill-holders, proving against both estates, must deduct from proof the amount of any dividend previously received from the other (ib.).

Where the indorser of a note becomes insolvent and compounds with his creditors including the holder of the note, who, however, reserves his recourse against the other parties to the note, and the maker afterwards becomes insolvent, the indorser cannot rank on the note against the estate of the maker so long as the holder has not been paid in full.

When a claimant in insolvency has received, as holder of a note, a composition on the amount of his claim from the indorser, in consideration of which he has released the indorser, reserving his recourse against the other party to the note, whatever the claimant has received from the indorser must be deducted from the amount of the claim which he can prove against the maker's estate (re *Bessette*, 15 L. C. J. 126); although the dividend on both estates will not amount to twenty shillings in the pound.

In this case the claimant had received a part only of his dividend on the one estate, and there was a considerable sum still due, but the claimant was allowed to prove for the full amount of his claim, less the sum actually received.

A creditor who, in accepting a composition whereby the insolvent agrees to pay ten shillings in the pound, reserves his recourse against indorsers of notes, which he holds, and upon other securities, is not bound to deduct the sums obtained from such indorsers from his dividend merely, but from the total amount of his claim (*Joseph v. Lemieux*, 17 L. C. R. 170).

Wholesale traders supplied goods to a retail dealer on the terms that he was to be allowed a discount of twenty per cent. from the the invoice prices on payment in cash within a month. The debtor accepted bills of exchange for the amount due, after deducting the twenty per cent. discount, but he did not pay the bills or make cash payments according to the agreement, and it was held that proof must be admitted in the bankruptcy of the retail dealer for the full amount of the invoice price of the goods without deduction of the discount (re *Cumberland*, L. R. 3 Ch. D. 803).

On the insolvency of a shareholder in a joint stock company before calls made in respect of his shares the company cannot prove in respect of the subscription. Shares in an English company were taken by a resident at Bombay who became insolvent. Afterwards the company was ordered to be wound up. The debtor subsequently obtained an order of discharge under an Indian Act, and it was held that the liability of the insolvent in respect of the shares was not a debt provable in the insolvency proceedings, and that, therefore, it was not barred by the order of discharge (re *East India Cotton Agency*, L. R. 3 Ch. D. 264).

81. If any creditor of the insolvent claims upon a contract dependent upon a condition or contingency which does not happen previous to the declaration of the first dividend, a dividend shall be reserved upon the amount of such conditional or contingent claim until the condition or contingency is determined; but if it be made to appear to the judge that the estate may thereby be kept open for an undue length of time, he may, unless an estimate of the value of such claim be agreed to between the claimant and the in-

spectors, order that the value of such contingent or conditional claim be established by such person or persons as the claimant and the inspectors may appoint, and in case they do not agree, then by such person or persons as the judge shall name ; and the persons so named shall make their award—which award the judge, after hearing the claimant and inspectors, may reject or confirm. In case the award be rejected, other persons shall be appointed as herein provided, to establish the value of such claim, subject to the control of the judge, and if the said award be confirmed, the amount therein mentioned shall be that for which the claimant shall rank upon the estate as for a debt payable absolutely.

This section contains a new provision in reference to arbitration as to the value of the claim—any person may be selected as arbitrator under this section, though the 57th section of the Act of 1869 required the assignee to act. And the section provides for a second reference to arbitrators if the first award be rejected.

This section will not apply where the condition or contingency happens before the assignment is made or the writ of attachment is issued (*Burrowes v. De Blaquiere*, 34 Q. B. U. C. 498).

It would seem that this section only applies to debts payable on a contingency, and not to mere contingent liabilities which may never become debts (*Hinton v. Acraman*, 2 C. B. 409 ; ex parte *Marshall*, 3 Dea. & C. 120).

The liability of an underwriter before a loss takes place is a mere contingent liability, and, therefore, not provable under the Act. Defendant wrote, in favour of the plaintiff, a policy of insurance on a ship of which plaintiff was part owner, loss, if any, to be paid in sixty days after proof of loss, and adjustment and proof of interest, no partial loss or particular average to be made good, unless it should amount to five per cent. on the valuation. And the ship was beached in a gale on the 18th of October, 1872. Efforts were made between this date and the 30th to get her off, and she was finally hove off and towed to an anchorage on the 31st of October, where she remained until the 9th of November. On the 14th she was hauled into a dry dock, and on the 16th examined by surveyors, who reported what damage was done, and recommended repairs. On December the 3rd she was hauled out of dock, and on December the 12th the



surveyors reported that all damage had been made good, and on the 18th of January, 1873, the adjustment of loss with proof were furnished to the broker for the underwriters. On the 28th of October, 1872, defendant made a voluntary assignment under the Insolvent Act of 1869, and obtained his discharge under section 105 on the 19th of January, 1874. The schedule prepared at first meeting of creditors did not include the plaintiff's name, nor was his claim included in any supplementary schedule furnished the assignee until about the 10th of March, 1874, when plaintiff's name was furnished to the assignee in time to entitle plaintiff to obtain the same dividend as those in the original list. Plaintiff was notified to file his claim, but declined to do so, and sued defendant for the full amount. It was held that at the time of the defendant's assignment the liability to the plaintiff was not a debt payable upon a contingency, but a mere contingent liability which was not capable of being proved, and, therefore, that the discharge was no bar to the plaintiff's action (*Rowan v. Harrison*, 2 Pugsley, 503; 11 Q. L. J. N. S. 252).

In this case, the plaintiff's name was not furnished to the assignee until after the plaintiff had issued his writ, and until after the defendant's discharge, and the assignee then had on hand funds sufficient to pay the plaintiff the same dividend as the other creditors, if authorized to do so, after having declared and paid one dividend. Surely the case cannot be an authority to establish that a claim cannot, in any case, be proved on a policy of insurance against an insolvent insurer, unless the loss has occurred prior to or at the time of the assignment. True, the liability is contingent until a loss occurs, but when a loss takes place, and is properly proved, and in sufficient time, and before the insolvent obtains his discharge, it is submitted the claim is one which may be allowed in the Insolvent Court. This has been held in the United States, although the loss did not occur till after the commencement of the proceedings in bankruptcy (re *Am. Glass Ins. Co.* 12 B. R. 56).

The Statute in force in the United States speaks of "contingent debts, and contingent liabilities contracted by the bankrupt," and allows proof thereof. There it is held, that the phrase "contingent debts" means not demands, whose existence depends on a contin-

gency, but existing demands on which the cause of action depends on a contingency (*French v. Morse*, 68 Mass. 111).

The case of *Rowan v. Harrison* was decided on the Act of 1869. The third section of that Act required the schedule to show "any contingent liabilities, describing the same." The claim against the underwriter was held not to come within the 56th section of that Act (corresponding to this section of the present Act). The Court seemed to rest its judgment on the ground, that, at the time of the assignment, no loss had happened, and it was therefore uncertain whether any claim would arise.

It is necessary to distinguish between a contingent demand and a contingency, whether there ever will be a demand (*Woodard v. Herbert*, 24 Me. 358). The contingent demands provided for by the Statute, are those contingent demands which are in existence as such, and in such a condition that their value can be estimated (ib.).

Every joint debtor has a demand against his co-debtor, contingent upon his being compelled to pay more than his share of the debt, and such demand is provable (*Dean v. Speakman*, 7 Blackf. 317; *Clarke v. Porter*, 25 Penn. 141).

As long as it remains wholly uncertain whether a contract or engagement will ever give rise to an actual duty or liability, and there is no means of removing the uncertainty by calculation, such contract or engagement is not provable. A covenant for an indefeasible title in fee, cannot be proved, when the claim consists merely of a contingent right of dower in the wife of one of the former owners of the property (*Riggin v. Magwire*, 8 B. R. 484). This provision has no application to a claim for storage which arose after the commencement of proceedings in insolvency, under a contract which was terminable at pleasure. There must be a debt or liability, either as principal or surety, which, if the contingency has happened, or the term of credit has expired, will be ascertainable (*Robinson v. Pesant*, 8 B. R. 426).

Where the payment of a debt cannot be enforced until the happening of some contingency, such debt being readily estimated may be proved, or if the extent of a liability depends upon the happening of a contingency, and such contingency is reasonably

certain to happen before final dividend, the Court may, by some method, determine the value to be placed by the claimant on such debt, and admit him to prove it (*U. S. v. Throckmorton*, 8 B. R. 309).

Where there is a stipulation in an ante-nuptial settlement that the wife surviving is to receive in lieu of dower the interest on £1,000, during the term of her life, should she survive her husband, the principal to go to the children after her death, this is a "contract dependent upon a condition or contingency," although the wife would have no vested interest until after her husband's death (re *Morison*, 15 L. C. J. 166).

The English Bankruptcy Act of 1849, s. 178, provided that if a trader had contracted a liability to pay money on a contingency which should not have happened, and the demand in respect thereof should not have been ascertained before the filing of the petition, in such a case the creditor should be admitted to prove for such sum as the Court should think fit. The cases under this section may assist us in construing the section of our own Act now under consideration. It was held, under the English Act, that the liability must be to pay a sum of money of a certain amount, or at all events a sum the amount of which could be ascertained by some settled data, and that the contingency on which the liability depended must not be too remote, but that there must be a single contingency reducible to a matter of calculation and capable of valuation (*White v. Corbett*, 1 E. & E. 692; *Boyd v. Robins*, 5 C. B. N. S. 597; *Kent v. Thomas*, L. R. 6 Exch. 312). Upon these principles it was determined that this section did not apply to a covenant to pay premiums on a life policy which were not due at the date of the bankruptcy (*Warburg v. Tucker*, 5 E. & B. 384); nor to the liability of a surety for the payment of an annuity where there was a solvent grantor (*Amott v. Holden*, 18 Q. B. 593); nor to the possible demand for contribution which one surety has against his co-surety (*Adkins v. Farrington*, 5 H. & N. 586); nor to a covenant by a husband for the payment of such yearly sums as would be sufficient with other contingent payments to make up an annuity to his wife, determinable on a return to cohabitation (*Parker v. Ince*, 4 H. & N. 54); nor to a

covenant to pay an annuity determinable on future cohabitation (*Mudge v. Rowan*, L. R. 3 Ex. 85); nor to a guarantee for the price of goods to be supplied from time to time to third parties and which were supplied after the bankruptcy of the guarantor (*Boyd v. Robins*, supra); nor to a covenant to indemnify against the covenants in a lease (*Hoare v. White*, 3 Jur. N. S. 445); nor to covenant to indemnify against calls on shares in a Joint Stock Company (*Bettley v. Stainsby*, L. R. 2 C. P. 568; ex parte *Wiseman*, L. R. 7 Ch. App. 35); nor to the liability of a shareholder to pay calls made after obtaining his discharge in bankruptcy upon shares rejected by his assignees (*Mortin v. Martin*, L. R. 3 Q. B. 306; *Hastie's case*, L. R. 7 Eq. 3; ib. 4 Ch. App. 274; Robson, 3rd Ed. 237-8).

82. In the preparation of the dividend sheet, due regard shall be had to the rank and privilege of every creditor—which rank and privilege, upon whatever they may legally be founded, shall not be disturbed by the provisions of this Act, except in the Province of Quebec, where the privilege of the unpaid vendor shall cease from the delivery of the goods sold; but no dividend shall be allotted or paid to any creditor holding security from the estate of the insolvent for his claim, until the amount for which he shall rank as a creditor upon the estate as to dividends therefrom, shall be established as hereinafter provided; and such amount shall be the amount which he shall be held to represent in voting at meetings of creditors, and in computing the proportion of creditors, whenever under this Act such proportion is required to be ascertained.

The 58th section of the Act of 1869 did not contain the words "except in the Province of Quebec where the privilege of the unpaid vendor shall cease from the delivery of the goods sold."

In the Province of Quebec, under the new Act, the privilege of the unpaid vendor ceases on the delivery of the goods sold. The privilege therefore ceases as soon as the right to stop *in transitu* is gone. This right is determined when once the goods have actually reached their destination and been actually received by the vendee as his own (*Bolton v. Lancashire & Y. R. W. Co.* L. R. 1 C. P. 481, 8; re *Whitworth*, L. R. 1 Ch. D. 101; see as to stoppage *in transitu*, *Lewis v. Mason*, 36 Q. B. U. C. 590).

This section does not, however, affect the right of stoppage *in*

*transitu* (see on the Act of 1864, in Quebec, *Hawksworth v. Elliott*, 10 L. C. J. 197).

83. No lien or privilege upon either the personal or real estate of the insolvent shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the insolvent, if before the payment over to the plaintiff of the moneys actually levied under such writ, the estate of the debtor has been assigned to an assignee, or if proceedings to place the same in liquidation under this Act, have been adopted and are still pending. But this provision shall not affect any lien or privilege for costs which the plaintiff possesses under the law of the Province in which such writ shall have been issued.

What is meant by "proceedings" in this section? Would the service of a demand under section four be deemed "proceedings to place the same in liquidation under this Act?"

The 59th section of the Act of 1869 differed materially from this section; under the former the execution creditor was entitled to the fruits of his execution if the same were realized before the estate was actually placed in insolvency.

Under the Act of 1865 (29 Vict. chap. 18, s. 12), goods actually under seizure, passed to the assignee, if they were not actually sold by the sheriff under the writ of execution, but where the sale by the sheriff took place before the assignment, the execution creditor was entitled to the proceeds, in preference to the assignee (*Brand v. Bickle*, 4 U. C. P. R. 191; 4 U. C. L. J. N. S. 95).

Under the 13th section of the Act of 1865, where the sheriff seized on a *fi. fa.* and made the money before an assignment, the execution creditor was held entitled to it, though it was not paid over to him at the time of the assignment (*Sinclair v. McDougall*, 29 Q. B. U. C. 388).

In Quebec it was held, under the Act of 1864, that the assignment transferred to the assignee, effects already seized in the suit, and that an opposition, filed by the assignee, claiming the effects seized, to be divided amongst the creditors, under the Act, would be maintained (*Bacon v. Douglas*, 15 L. C. R. 456).

Under section 13 of the Act of 1865, the priority of right

might have been destroyed by a sale under execution. Thus, under this Act, where a writ of execution was placed in the sheriff's hands on the 15th March, 1866, and on the 26th of the same month, a sale of the goods thereunder commenced at 10 a.m., and was completed at 11 a.m. At the latter hour, on the day of the sale, a writ of attachment, in compulsory liquidation against the insolvent, was placed in the sheriff's hands; it was held that the attachment could not prevail over the execution, and that the sheriff was not liable to the assignee in insolvency for the proceeds of the goods sold (*Whyte v. Treadwell*, 17 C. P. U. C. 488). The ground of the decision in this case, was that, by the sale under execution, the property was entirely gone, and formed no part of the estate of the debtor at the time when the attachment issued. If it had formed part of such estate, it would have belonged to the assignee for the benefit of the creditors, as all property of the insolvent, except only such as is exempt from seizure and sale under execution, passes to the assignee on an assignment, or the issue of a writ of attachment.

In *Converse v. Michie* (16 C. P. U. C. 167), the goods were still the property of the insolvent, at the time when the two writs were delivered to the sheriff by the execution and the attaching creditors. The latter case was decided under section 13 of the 29th Vict. chap. 18. On the 18th September, 1865, a judgment was recovered against the debtor, and an execution was issued on the same day, and placed in the hands of the sheriff about half-past 10 a.m., under which the sheriff made a levy about 11 a.m.; a writ of attachment in insolvency was sued out on the same day against the debtor, and placed in the sheriff's hands about 11.30 a.m. The Act 29 Vict. chap. 18, s. 13, came into force on the same day, the Royal assent having been given at 3 o'clock in the afternoon. On the principle that judicial proceedings and Acts of the Legislature take effect in law from the earliest period of the day upon which they are respectively originated, and come in force, the Court held that the writ of attachment in insolvency, which derived its effect from the Act, prevailed over the execution, for the latter only bound from the actual minute of delivery to the sheriff, the delivery not being judicial act, but the Statute was

in force from the first minute of the same day (*Converse v. Michie*, supra; see also *Darling v. Wilson*, 16 Grant, 255).

It would seem that the provisions of this section only apply to writs of execution, properly so called; and where the effects of the insolvent were seized by the plaintiff, under a writ of attachment, issued against him as an absconding debtor, and the proceeds of the sale thereof remained in the sheriff's hands at the time his estate was placed in compulsory liquidation under the Insolvent Act, it was held that the plaintiff, the attaching creditor, was entitled to the proceeds, as against the assignee in insolvency (*Neal v. Smith*, 9 C. L. J. N. S. 74-5; but see *Patterson v. McCarthy*, 35 Q. B. U. C. 14 post 249-50).

When an assignment is made, the intention of the Act is that the estate and effects of the insolvent should be wholly administered by the Court in the insolvency proceedings, and if a sheriff has, before the assignment, seized goods of the insolvent under a writ of execution, it is his duty, on the assignment being made, to surrender the goods to the assignee, leaving the execution creditor to assert his privilege for costs, if he has any, in the proceedings in insolvency (*Blakeley v. Hall*, 21 C. P. U. C. 138).

In Ontario, where judgment in default of appearance is obtained on a specially indorsed writ, no execution can issue until the expiration of eight days from the last day for appearance. Where judgment was entered and execution issued before the expiry of that period, and an assignment in insolvency was made by the defendant five days after the issue of the execution, the execution was set aside at the instance of the insolvent and assignee (*Randall v. Bowman*, 1 U. C. L. J. N. S. 158).

Where final judgment, in default of appearance to a specially indorsed writ, was entered on the 23rd of January, and execution issued on the 30th of the same month, and a writ of attachment, under the Insolvent Act, issued on the 3rd of February, an application on the 28th of March, at the instance of the official assignee, to set aside the judgment as irregular, for a defect in the affidavit of service was held too late (*Dunn v. Dunn*, 1 U. C. L. J. N. S. 239).

The attachment issued before the sale of the goods, and leave to the assignee to come in and defend the suit was refused, as

the plaintiff, the execution creditor, would thereby lose his priority in respect of the execution, but the assignee was allowed to move to set aside the judgment on the ground of fraud. This case was decided under the Act of 1864, and it is doubtful whether it would now be followed in regard to allowing the assignee to defend the suit. As the attachment issued before the sale of the goods, no privilege could be obtained by the execution creditor as against the assignee. Under this section of the present Act the attachment would have priority, unless the money made by the sheriff was actually paid over to the execution creditor. And it would seem now to be immaterial to the assignee whether he were allowed to set aside the judgment or not.

The policy of the insolvent law is that, after the assignment, the whole of the insolvent's estate shall be administered in the Insolvent Court, and, even before the enactment of this section, it was held that a prior execution in the sheriff's hands would not prevent the entire property from passing to the assignee. Thus, where a writ of attachment, under the Absconding Debtors' Act, was received by a sheriff, and acted upon by attaching the defendant's goods, and afterwards writs of *fi. fa.* were placed in the sheriff's hands against the defendant, it was, nevertheless, held that the defendant's property passed to the assignee under a writ of attachment in insolvency subsequently received by the sheriff (*Henry v. Douglas*, 1 U. C. L. J. N. S. 108).

The aim and policy of the insolvent law, as expounded in this section, are to prevent all judgment debts, without exception, becoming a lien, if the money recovered is not paid over before the insolvency. The word "sheriff" only is used in the Statute, but it is used to illustrate the intention of the framers of the provision, namely, the delivery to the proper officer who has the execution of the writ, not to indicate the nature of the judgment debts, or the court out of which the execution issued, and accordingly it has been held that this section applies to judgment debts recovered in Division Courts, in which execution has been issued, and the money levied thereunder by a bailiff of such Courts, although the section speaks only of



executions delivered to the sheriff (*Patterson v. McCarthy*, 85 Q. B. U. C. 14). In this case, it was objected that the defendant received the money only as clerk of the Court; but, as it appeared that the sale had taken place after the assignment, the Court held that the goods sold had previously passed to the assignee, and he was entitled to their proceeds, no matter in whose hands they might be.

Where an execution against the insolvent's effects is placed in the sheriff's hands, and the execution debtor makes an assignment within thirty days thereafter, the execution creditors are nevertheless entitled to their costs of suit, to be proved as a privileged claim before the assignee (re *Fair*, 2 U. C. L. J. N. S. 216; Logie Co. J.; see also section 3 [k]).

The word privilege is frequently used in Quebec, as referring to certain preferential or secured rights or claims, and in all probability this word was used in reference to that Province; and the word lien as applicable to Ontario. The expression lien is generally used to designate a right which a party has to retain that which is in his possession or power, until certain demands are satisfied, and a particular lien may arise by mere operation of law. In the Province of Ontario, before the passing of the Act, an execution creditor, when he placed his writ in the sheriff's hands, had a particular lien on his debtor's property, to the extent of his debt and costs. This section deprives him of that lien, for the judgment debt, under the circumstances stated; but it does not affect his lien for the costs of recovering that judgment, and a judgment creditor who has an execution in the sheriff's hands at the time the assignment is made, is entitled to rank for his costs of the judgment as a privileged creditor, against the insolvent (re *Heyden*, 29 Q. B. U. C. 262; overruling re *Ross*, 3 P. R. U. C. 394; see also *Canada L. C. Co. v. McAllister*, 21 Grant, 593).

Where proceedings for compulsory liquidation are taken under the Act, and an attachment is issued, money which has been levied by the sheriff under an execution against the debtor, but which has not been paid over to the judgment creditor, passes to the assignee, under this section (*Bullen v. Harding*, Mich. T. 1871; Stephen's Digest, N. B. Reports, 227, 228).

84. If a creditor holds security from the insolvent or from his estate, or if there be more than one insolvent liable as partners, and the creditor hold security from, or the liability of one of them as security for a debt of the firm, he shall specify the nature and amount of such security or liability in his claim, and shall therein on his oath put a specified value thereon; and the assignee, under the authority of the creditors, may either consent to the right to rank for such liability, or to the retention of the property or effects constituting such security or on which it attaches by the creditor, at such specified value, or he may require from such creditor an assignment of such liability, or an assignment and delivery of such security, property or effects, at an advance of ten per centum upon such specified value, to be paid by him out of the estate so soon as he has realized such security, in which he shall be bound to the exercise of ordinary diligence; and in either of such cases the difference between the value at which the liability or security is retained or assumed and the amount of the claim of such creditor, shall be the amount for which he shall rank and vote as aforesaid; and if a creditor holds a claim based upon negotiable instruments upon which the insolvent is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the party primarily liable thereon as being his security for the payment thereof; but if such claim is mature or exigible at the date of the assignment, or the issue of the writ of attachment or becomes so, and remains unpaid thereafter, whether before or after proof, such creditor shall be entitled for ranking, to treat the claim as unsecured, but for voting or consenting to a discharge or a deed of composition and discharge or for any other purpose, save ranking, he shall be still considered to hold security within the meaning of this section, and shall for all such purposes put a value on the liability of the party primarily liable thereon as being his security for the payment thereof," (40 Vict. s. 21).

The 39th Vict. chap. 30, s. 15, which amended this section has since been repealed, 40 Vict. s. 32.

This section of the Act must be complied with before dividends are paid (see section 82). It will be observed that when a secured claim is filed, the assignee has no power to act, except under the authority of the creditors (see also section 86).

The general purpose and policy of the Act is to produce equality among the creditors of insolvent debtors, with the exceptions provided for in the Act, and to attain that end, its provisions should, in case of extreme doubt, be construed beneficially for the general unsecured creditors (re *Jaycox*, 8 B. R. 241).

Every line of this section points most distinctly and directly to

property of the insolvent, and only to property of the insolvent which the Insolvent Court can deal with, and does not contemplate the sale of property of third parties, held by the claimant as security for his demand (re *Cram*, 1 B. R. 504; re *Babcock*, 3 Story, 393).

This section only refers to security which the creditor may hold from the insolvent himself, or from his estate, or from one partner on account of the firm. If the creditor's security is from the estate of a third person, the rule does not apply. In such case the creditor may prove his whole debt against the insolvent's estate, and apply himself to his security for the deficiency, not receiving, however in the whole, more than one hundred cents in the dollar (ex parte *English*, L. R. 4 Ch. App. 49). If the creditor realizes his security before proving against the insolvent estate, he can only prove for the balance remaining unpaid (ex parte *Todd*, 2 Rose, 202).

In England, as well as in this country, the amount of the security which a creditor holds from the estate of a bankrupt, must be deducted from the amount for which he proves on the estate. But before the creditor is compelled to do this, the security must be from the bankrupt's estate. *R. & Co.*, merchants at Madras, consigned goods to H., their agent in London, for sale on their account, and in respect of these goods drew bills of exchange upon H. The bills were discounted by *R. & Co.*, and indorsed to the Madras branch of a London bank, to whom the bills of lading of the goods were delivered with the bills of exchange. They were sent to London and tendered to H. for acceptance, and he accepted them "payable on delivery of the bills of lading." H. became bankrupt before the acceptances matured, and it was held that the acceptance was a conditional one, and that the bank held security for their debt, upon what was in effect part of the estate of H., inasmuch as he was not bound to pay the acceptances unless the bills of lading were at the same time given up to him (ex parte *Brett*, L. R. 6 Ch. 838; 25 L. T. N.S. 252; see also ex parte *Ashworth*, L. R. 18 Eq. 725).

When the creditor's security is from the insolvent firm he can

only prove for the balance, after deducting the value of the security (re *Collie*, L. R. 3 Ch. D. 481).

A creditor who holds security upon the property of a third person has a provable debt for the full amount against the estate of his debtor. If the debtor is a surety, and pays the debt, he may be entitled to the benefit of the collateral security. But, in insolvency, it seems more just and equitable that the creditor should have the benefit of all his remedies, so that he may obtain his whole debt if possible. If he is obliged to realize his security, and prove only for the balance, he will be losing the advantage for which he has stipulated, of the full credit of the promise of the surety (re *Alexander*, 4 B. R. 178; *Fox v. Eckstein*, 4 B. R. 373).

If the creditor holds a mortgage upon the real estate of the insolvent, the creditors' consent to the retention of the property embraced in the mortgage might perhaps be held to authorise the assignee to release the insolvent's right of redemption to the secured creditor, subject to the provisions of the 85th section. In the United States it is held that the act of the assignee in allowing a creditor to retain an alleged security after deducting the value of the same from the amount of the claim, does not preclude other creditors claiming the same security, if they have not proved their claims (*Second N. B. v. State N. B.*, 11 B. R. 49; 10 Bush, 367).

It would seem that, when the assignee abandons his claim to the secured creditor, the latter has the same rights and remedies to enforce his security as if the insolvency proceedings had never been instituted (ib.).

The Statute in force in the United States speaks of the creditor having a "lien" on the property of the insolvent, and there it is held that mechanics' liens come within this provision, and that such lien may be filed after the commencement of the proceedings in insolvency. But the provisions of the Statute necessary to keep the lien alive must be observed (*Clifton v. Foster*, 3 B. R. 656; re *Sabin*, 12 B. R. 142; re *Brunquest*, 14 B. R. 205). The lien-holder cannot, however, claim for work done after the commencement of the proceedings in insolvency (re *Cork*, 3 Biss. 122).

If the security consists of a policy of insurance, the value of

which is assessed by the creditor, on his proving against the estate, and the policy falls in before the assignee expresses his election, it would seem that the assignee and not the creditor is entitled to the sum insured, less the amount at which the value was, on proof assessed by the creditor (ex parte *King*, L. R. 20 Eq. 273).

The secured creditor is not bound by the debtor's estimate of the value of the security (re *Bestwick*, L. R. 2 Ch. D. 485).

The acceptance of a composition on a joint debt is no satisfaction of the separate liability in respect of a joint and separate debt (*Simpson v. Henning*, L. R. 10 Q. B. 406).

A joint creditor, holding separate security, may vote for and receive a composition in respect of his whole debt without giving up the separate security (re *Little*, L. R. 18 Eq. 249).

The rule in England is that if a creditor of the firm has a security upon the separate estate of one partner, he will be entitled to prove against the joint estate without giving up his security (*Bank of Australasia v. Flower*, L. R. 1 P. C. 27), and this was also the decision in re *Chaffey* (30 Q. B. U. C. 64), in the Province of Ontario, decided on the Act of 1864.

In this case the appellants in the matter of C. & Co. insolvents, had a claim upon a note made by C. & Co., payable to C. one of the firm and by him endorsed to the appellants. They proved against the firm on the 3rd July 1869, but afterwards withdrew it and proved on the 11th January 1870, under section 60 of the Act of 1869, specifying and putting a value on the separate liability of C. The Court held, affirming the decision of the county judge, that the appellants, under the Act of 1864, could not rank both upon the separate estate of C., and on the estate of the firm, but must elect; but that they might prove against the joint estate for their whole claim, without deducting from it the value of C.'s separate liability. It was held also, that the appellants could treat the payee and endorser as having incurred a separate liability by his indorsement distinct from his joint liability as a maker. It was held also, that the Act of 1869 could not apply, for the case was pending before it, and the question in dispute as to the right

to prove was not a matter of procedure, only exempted from the exceptions in the repealing clause (re *Chaffey*, 30 Q. B. U. C. 64).

This case cannot be regarded as an authority that, under the Act of 1869 or the present Act, a creditor, who holds the note of a firm endorsed by an individual partner, would not be bound to specify the nature and amount of such separate indorsement as a security under this section. The Act of 1864, on which the decision was based did not contain the words, "or if there be more than one insolvent liable as partners and the creditor holds security from or the liability of one of them as security for a debt of the firm," &c. Therefore, if a creditor holds a note made by a firm in partnership, endorsed by one of the partners individually, he must under this section, when proving against the estate of the firm, put a value on the separate indorsement. In fact this was decided in re *Baker*, (3 Ch. Cham. 499 ; 8 C. L. J. N. S. 136); and this rule will apply only when both the estates are being administered in insolvency. As has been already pointed out in this work the different sections of the Act apply only to those who have made assignments or against whom writs of attachment have issued. A creditor, therefore, holding the note of an insolvent firm, endorsed by one of the partners can prove in an administration suit in respect of the indorsement, though he has proved in the insolvency proceedings against the firm, this section not applying in such case (re *Baker*, *supra*).

On the insolvency of a firm, promissory notes drawn by the firm in favour of, and indorsed by, one of its members do not entitle the holders who are cognizant of the connection of the parties to prove against both estates, but they may elect against which estate to prove, and this election may be made before dividend paid (re *Dodge* 8 C. L. J. N. S. 51).

If an insolvent has carried on business in this and some other country, and has assets in each country connected with each business, and a particular creditor is able to lay hold of the personal assets of the insolvent in the foreign country, and afterwards comes to this country to share with the other creditors, he must bring into the estate here, that which the law of the foreign country has given him in preference to the other creditors. Thus

it has been held in England under the 152nd section of the Act of 1861, where a debtor carried on business in England and Brazil, and on his becoming bankrupt a creditor received part of his claim out of the assets in Brazil, and afterwards claimed to receive dividends on the entire amount of his claim out of the assets being administered in England, that this section did not apply, consequently the creditor was not entitled to receive any dividend out of the assets in England until the other creditors had received a dividend equal to that received by him in Brazil (ex parte *Wilson*, 26 L. T. N. S. 489 ; L. R. 7 Ch. 490).

A secured creditor, who, in his proof, claims a lien upon the entire estate of the insolvent, when he only has a lien upon a certain portion thereof, does not thereby lose the real lien to which he is entitled, nor is his proof thereby vitiated (*McKinsey v. Harding*, 4 B. R. 39).

It is held in the United States that a secured creditor who proves his claim without reference to his lien or security, and without apprising the Insolvent Court of its existence, thereby waives his lien and relinquishes it to the assignee (re *Stansell*, 6 B. R. 183 ; re *Granger* 8 B. R. 30).

A secured creditor may give up his security and prove in respect of the whole debt under this section. If he proves for the whole debt, he will be considered to have elected to give up his security, and this, it would seem, even though at the time of so voting, he was unaware that he was a secured creditor (re *Hoare*, L. R. 18 Eq. 705).

It has been held in England, that if the creditor give up his security, and the bankruptcy is subsequently annulled, the creditor is entitled to have the security returned to him, although the debtor be adjudicated a bankrupt on some other petition (ex parte *Morris*, 14 L. T. N. S. 606).

The creditor holding security, may either elect to retain it and decline to rank on the estate, or he may, if he considers the security insufficient, put a value on it under this section, and rank for the difference. If a creditor deliberately elects to look only to his security, he cannot afterwards be permitted to rank on the estate. What will amount to such election depends on the circum-

stances of each case. If the general creditors are not in any way prejudiced by the act done, and can be placed in the same position as they were before, the creditor will not be held to have made his election. Thus it has been held that a creditor holding security, is not, by the mere fact of selling or disposing of such security after the assignment, precluded from ranking on the estate. If the creditor selling has dealt fairly with the securities, and the estate has lost nothing by the sale, or if it has been or can be fully recompensed for any supposed damage suffered, then, after making good such damage, the creditor selling and complying with the provisions of this 84th section will be allowed to rank for his debt (re *Hurst*, 31 Q. B. U. C. 116).

If a creditor, holding security, wishes also to rank on the estate, he ought to put a value on his security, and comply with the provisions of this section. A secured creditor, who after the assignment, receives payment of part of his claim, as for instance by exercising the power of sale under a mortgage, may be allowed to prove on his bringing in the money received for the benefit of the other creditors.

Re *Hurst* (31 Q. B. U. C. 116) decided that a secured creditor might realize his security after the insolvency of the debtor, and if he did so fairly and the estate had not lost anything thereby, he did not waive his right to come in under this section and prove for the deficiency. Therefore a creditor who holds a note on which the insolvent is secondarily liable may proceed against the party primarily liable thereon after insolvency, may put a value on the amount realized, and prove for the deficiency under this section.

This case seems to go far in the direction of introducing the English rule in the case of secured creditors. There such creditors may either retain their securities and compel the trustee to redeem them, or they may realize their securities or apply to have them realized under the direction of the Court, and prove for any deficiency (B. Act, 69, s. 12, Rule 78; see *White v. Simmons*, L. R. 6 Ch. App. 555).

The power to realize, and then prove for the deficiency, is an



important power to the secured creditor, as it enables him to determine exactly the value of his securities. —

The English Act of 1869 uses the words "any creditor holding a security," and it defines a creditor holding a security to mean "any creditor holding any mortgage, charge, or lien on the bankrupt's estate, or any part thereof, for a debt due to him. It was held that a creditor who has levied execution under a *fi. fa.* by seizure of the debtor's goods (*Slater v. Pinder*, L. R. 6 Exch. 228; *ib.* 7 Exch. 95), or has obtained and served a garnishee order under the Common Law Procedure Act, 1854 (*Emmanuel v. Bridger*, L. R. 9 Q. B. 286), is a secured creditor within the Act. And it is immaterial, in the case of a garnishee order, that it has not been made absolute (*Lowe v. Blakemore*, 23 W. R. 85), which may, in this respect, be considered to have overruled *ex parte Greenway*, (L. R. 16 Eq. 619).

85. But if the security consists of a mortgage upon real estate, or upon ships or shipping, the property mortgaged shall only be assigned and delivered to the creditor, subject to all previous mortgages, hypothecs and liens thereon, holding rank and priority before his claim, and upon his assuming and binding himself to pay all such previous mortgages, hypothecs and liens, and upon his securing such previous charges upon the property mortgaged, in the same manner and to the same extent as the same were previously secured thereon; and thereafter the holders of such previous mortgages, hypothecs and liens, shall have no further recourse or claim upon the estate of the Insolvent; and if there be mortgages, hypothecs or liens thereon, subsequent to those of such creditor, he shall only obtain the property by consent of the subsequently secured creditors; or upon their filing their claims specifying their security thereon as of no value, or upon his paying them the value by them placed thereon; or upon his giving security to the Assignee that the estate shall not be troubled by reason thereof.

If a mortgage is given when the debtor is notoriously insolvent to the knowledge of the creditor and for the purpose of obtaining a fraudulent preference over other creditors, collocation in respect of it will not be allowed (*Whitney & Shaw*, 4 *Revue Legale*, 483).

If an assignee sells property of the insolvent on which there are mortgages first and second—and receives the purchase money sufficient to pay the first nearly off and part of the second, the

first mortgagee must be paid in full out of the proceeds and the balance only can go to the second mortgagee. In one case the assignee, after selling the property, paid over part of the money to the second mortgagee, and then absconded with the rest of the money. It was held that the conversion of the mortgaged property into cash in the assignee's hands did not, under these circumstances, alter the rights of the mortgagees as between themselves; that the first mortgagee was entitled to be paid out of the proceeds of the property mortgaged, the loss of a portion of it did not affect him so long as enough remained to satisfy his claim, and that he should be paid in full before anything was paid to the second mortgagee (*Hartean v. Boyer*, 2 *Revue Critique*, 479).

86. Upon a secured claim being filed, with a valuation of the security, it shall be the duty of the assignee to procure the authority of the inspectors, or of the creditors at their first meeting thereafter to consent to the retention of the security by the creditor, or to require from him an assignment and delivery thereof; and if any meeting of inspectors or of creditors takes place without deciding upon the course to be adopted in respect of such security the assignee shall act in the premises according to his discretion and without delay.

It will be observed that if any meeting of the inspectors or creditors is held after the filing of the secured claim, and no directions are then given to the assignee as to the treatment of the claims under section 84, he is empowered to exercise his own discretion in the matter.

87. The amount due to a creditor upon each separate item of his claim at the time of the execution of a deed of assignment, or of the issue of a writ of attachment, as the case may be, and which shall remain due at the time of proving such claim, shall form part of the amount for which he shall rank upon the estate of the insolvent, until such item of claim be paid in full, except in cases of deduction of the proceeds, or of the value of his security, as hereinbefore provided; but no claim or part of a claim shall be permitted to be ranked upon more than once, whether the claim so to rank be made by the same person or by different persons; and the assignee may, at any time, require from any creditor a supplementary oath, declaring what amount, if any, such creditor has received in payment of any item of the debt upon which his claim is founded, subsequent to the making of such claim, together

with the particulars of such payment ; and if any creditor refuses to produce or make such oath before the assignee within a reasonable time after he has been required so to do, he shall not be collocated in the dividend sheet.

Under this section a creditor can only rank for the amount due at the time of proof, giving credit for all payments since the assignment or the issue of the writ of attachment.

88. If the insolvent owes debts both individually and as a member of a co-partnership, or as a member of two different co-partnerships, the claims against him shall rank first upon the estate, by which the debts they represent were contracted, and shall only rank upon the other after all the creditors of that other have been paid in full.

An individual partner may be insolvent, although the partnership to which he belongs is quite solvent. The effect of his insolvency, by the express language of the 40th section of the Act, is to dissolve the partnership. The claims against him individually are provable as well as those against him as a member of the partnership. Those against him personally rank on his individual estate first, and those against him in respect of the partnership rank on the partnership estate first. After the partnership claims have been satisfied out of the partnership funds, the individual debts may rank on the partnership estate ; and so, after the individual debts are satisfied out of the estate which is applicable to their payment, the partnership claims may rank on this estate (re *McKenzie*, 31 Q. B. U. C. 7).

If a partner fraudulently takes money out of the partnership assets for his own private purposes, a proof can be made for it on behalf of the firm against his private estate in competition with his private creditors (*Lucey v. Hill*, L. R. 4 Ch. D. 537 ; following ex parte *Harris*, 2 V. & B. 210).

The rule in equity, as well as in bankruptcy, is that the separate estate of a partner is to be applied first in discharge of his separate debts, and, in applying this rule, money paid by co-partners on a liability created by the fraud of a partner towards them is treated as a separate debt, provable and payable *pari passu* with the other separate creditors of such partner. In case

of his death insolvent, the mere liability so fraudulently created cannot be proved against the separate estate as a debt until the liability is paid, or until something equivalent to payment takes place. When the fraud was in the use of the partnership's name on bills, the other partners becoming insolvent, the holders of the bills proved them against the partnership estate. The assignee, in a suit for administering the separate estate of the guilty partner, claimed to prove the amount against the separate estate. But the master restricted the proof to the expected dividend from the partnership estate and the separate estate of the surviving partners, and the Court held that the assignee was not entitled to prove for a larger sum (*Baker v. Dawbarn*, 19 Grant, 113).

On the insolvency of a firm, the holders of promissory notes, drawn by the firm in favour of, and endorsed by one of, its members, in his individual character, cannot prove against both estates when they are cognizant of the relation between the parties. They may, however, elect against which estate to prove, and if they have proved against one, they may, before any dividend is received or declared, abandon it, and prove against the other (re *Dodge*, 8 C. L. J. N. S. 51; Supreme Court, Nova Scotia). A similar decision was rendered in re *Chaffey* (30 Q. B. U. C. 64); where it was held that the holder of a note made by a firm, and endorsed by one of the partners individually, must elect, whether he will prove against the firm or against the individual partner.

But the doctrine against double proof applies only where both estates are being administered in insolvency, and a creditor who has proved in insolvency upon a promissory note made by an insolvent firm, can prove as a creditor in an administration suit against one of the parties deceased, who has separately endorsed the note (re *Baker*, 3 Ch. Cham. 499; 8 C. L. J. N. S. 136).

The doctrine in *ex parte Waring* (19 Ves. 345) does not apply unless there has been not only a double insolvency, but also a right of proof against both the insolvent estates, in respect of the same matter. The drawer of certain bills of exchange sent remittances to the drawee to meet his liability upon the bills. The drawer became bankrupt, and the drawee refused to accept the bills

of exchange, and shortly afterwards also became bankrupt. The Court held that there was no right of proof against the drawee's estate, and that a bill by the holder of the bills of exchange, praying for a declaration, that the remittances were specifically appropriated to meet the bills held by him, and ought to be applied in satisfaction thereof, without prejudice to his right to prove for the unpaid balance, must be dismissed with costs (*Vaughan v. Halliday*, 30 L. T. N.S. 741 ; 9 Ch. App. 561 ; *ex parte Greener*, 32 L. T. N. S. 205). There must also be the concurrent administration of both insolvent estates by competent tribunals (*re Yglesias*, L. R. 10 Ch. App. 635 ; *ex parte Gomez*, L. R. 10 Ch. App. 639).

The principle of *ex parte Waring* (19 Ves. 344) will not be applied to the prejudice of the joint creditors of two firms engaged in a common adventure, so as to deprive such creditors of the right to be paid out of goods constituting joint assets of the firms, but which as between them were appropriated to bills drawn by one firm, and accepted by the other (*ex parte Dewhurst*, L. R. 8 Ch. App. 965 ; 29 L. T. N. S. 125).

Two firms carried on jointly a trading adventure in cotton, the one drawing bills of exchange, the other accepting the bills, and it being agreed that the bills should be paid out of the proceeds of the cotton. The two firms became bankrupt, and it was held that the right of the bill-holders to have the proceeds of the cotton applied in payment of the bills upon the principle of *ex parte Waring* (19 Ves. 345) was subject to the right of the joint creditors (if any) of the aggregate of the two firms to have the proceeds of the cotton applied as part of the joint estate (*ex parte Dewhurst*, *supra*).

So also the principle does not apply as between vendor and purchaser or agent and principal where all property in the goods consigned, and in respect of which the bills were drawn and accepted, has been parted with by the consignor to the consignee, unless the consignor specially directs the proceeds of the goods to be applied in a particular way. A direction relating only to the invoice price of the goods, that is the debt due from the consignee

for the goods, will be insufficient for the purpose (ex parte *Banner*, L. R. 2 Ch. D. 278).

A, who was partner in a banking firm, on being appointed treasurer to a board of guardians, entered into a bond for the due discharge of his duties, his sureties being B, one of his partners, and C, who was not a partner in the firm. The bank stopped payment, and A died three days afterwards, and a suit was instituted in Chancery to administer his estate. The other partners in the firm were adjudicated bankrupts. A's joint and separate estates were both insolvent; but B's separate estate was solvent. When the bank stopped payment, over £5,000 was standing to the credit of the guardians. C paid this amount in full, and was repaid a moiety of it out of B's separate estate, having previously been admitted to prove in the Chancery suit for the whole £5,000. He also proved against the joint estate of the firm for the second moiety of the £5,000.

On an application by the trustee in bankruptcy of B's separate estate, for leave to prove against A's separate estate for the moiety of the £5,000 repaid to C. out of B's separate estate, it was held, that the application could not be allowed, inasmuch as its effect would be to make the separate creditors of A's insolvent estate contribute towards the payment of the joint debts of the firm, in aid of B's solvent separate estate (*Lacey v. Hill*, 28 L. T. N. S. 86; 27 L. T. N. S. 504).

This section assumes that there is both a joint and separate estate, and that there are creditors of both estates, and if there is no joint estate, the creditors of the firm will be entitled to rank as private creditors of the several estates of the respective partners (ex parte *Bradshaw*, 1 G. & J. 90). So also the joint creditors will be entitled to prove against the separate estate of one partner in competition with his separate creditors where part of the joint estate has been fraudulently applied by one partner for his private use (ex parte *Harris*, 2 V. & B. 210; *Lacey v. Hill*, L. R. 4 Ch. D. 537, ante 260). If there are no separate creditors of an insolvent partner, the joint creditors will, of course, be entitled to prove at once, for the purpose of receiving dividends from his separate estate (ex parte *Chandler*, 9 Ves. 35).

In the ordinary case of there being joint and separate creditors, and also joint and separate estates, the separate estate of each partner is to be first applied, in paying the debts of his separate creditors, until they are paid in full (ex parte *Elton*, 3 Ves. 238; ex parte *Taitt*, 16 Ves. 193).

If in a case of mutual accommodation paper between two firms or individuals, the account between the parties consists partly of outstanding or dishonoured bills, and partly of a cash account, proof can only be made in respect of the latter, and the bills must be struck out on both sides (ex parte *Walker*, 4 Ves. 373). The proof is for that sum for which an action could have been maintained by the one party against the other, the bills remaining in the situation in which they are actually found, if there had been no insolvency. Where A. had advanced cash, and given acceptances to B, and the latter had given to A. acceptances for part of the cash advances and acceptances of A., and A. discounted B's acceptances, and the holder thereof proved against B. on his becoming bankrupt; it was held that the trustee of A. could not, on his bankruptcy, prove against B's estate for more than the balance due, after deducting the acceptances given by B. to A. (ex parte *Macredie*, L. R. 8 Ch. App. 535; ex parte *Cama*, L. R. 9 Ch. App. 686).

It is a settled rule in bankruptcy that a partner cannot prove under a joint commission against his firm, in competition with the creditors of his firm. And this rule applies in a case where the partner had died before the bankruptcy, his share had been taken by the other partners, under the provisions of the partnership deed, and the money due in respect of it had not been paid to his executors at the time of the bankruptcy (*Mansen v. Gordon*, L. R. 1 P. C. D. 195).

But the exception to this rule, which is allowed where the debt is in respect of a distinct trade carried on by one or more of the bankrupt partners, is confined to the case where the debt in question arises in respect of goods supplied, and cannot be sustained when the debt arises in respect of cash advances (*Narraway v. Beattie*, 26 L. T. N. S. 310; affirmed on appeal, ib. 492).

Where the partnership articles provided that, on the death of a partner, the surviving partners should take his share at its value, to be ascertained by the last stock-taking before his death. The executor of a deceased partner, whose share was so taken by the continuing partners, was not allowed to prove against them for the purchase money, there being joint debts of the original firm remaining unpaid (ex parte *Gordon*, L. R. 10 Ch. App. 169 ; 31 L. J. N. S. 528).

It is competent for solvent partners to make any arrangement they think proper with respect either to the joint property of the firm, or the separate property of the persons constituting it, and to alter the character of the property, so as to convert joint into separate property and *vice versa*, and every such agreement, if made *bona fide*, will bind their creditors, and in the event of bankruptcy the property will be distributable as joint or separate estate, according to the character which it then bears as between the partners themselves (ex parte *Williams*, 11 Ves. 6 ; ex parte *Nanson*, 22 W. R. 875 ; 30 L. T. N. S. 40). Upon this principle, where the partnership deed between four persons provided that, on the death of a partner, the partnership should not be dissolved but that the survivor should carry on the business, and that the deceased partner's share should remain in the hands of the survivors for a limited time, and the amount should be ascertained and paid by instalments, and in the meantime be secured by the promissory notes of the survivors, it was held that the creditors of the four partners had no priority of payment out of the assets which could be proved to have belonged to the partnership of the four (re *Simpson*, L. R. 9 Ch. App. 572 ; 30 L. T. N. S. 448 ; see also ex parte *Dear*, L. R. 1 Ch. D. 514).

*Bona fides*, however, in cases of this sort, is the very essence of the transaction, and if the latter be tainted with fraud it will not bind the creditors, and where both partners, individually as well as the firm, were at the time of the assignment hopelessly insolvent, and this was known to the partners, the transaction was held to be fraudulent and void, as against the joint creditors (ex parte *Mayou*, 11 Jur. N. S. 433 ; see also re *Kemptoner*, L. R. 8 Eq. 287).



A trader, who carried on business in Brighton, married a widow who was entitled under a partnership deed to three-fourths of the profits of a business carried on in London. With the sanction of the Court of Chancery, the trader purchased the other fourth of the London business and executed a settlement by which he covenanted that his wife's three-fourths should be for her sole and separate use, free from his debts, and he afterwards filed a petition for liquidation, being considerably indebted in respect of his Brighton business, which he had continued to carry on quite unconnected with the London business. It was held, that the creditors of the London business were entitled to have their debts paid out of the assets of that business to the exclusion of the creditors of the Brighton business, and that his wife was entitled to three-fourths of any surplus which might remain after satisfying the debts of the London business, unaffected by the claims of her husband's separate creditors, who, however, would be entitled to be paid out of his one-fourth of the surplus, if any (*ex parte New*, 30 L. T. N. S. 447; L. R. 9 Ch. App. 508).

The rule that a partner cannot prove against the estate of his co-partner, till all the partnership debts have been paid in full, does not apply to a claim in respect of a devastavit, committed by an executor against the estate of his deceased partner, and, therefore, when an executor who has been in partnership with the testator wastes the assets, and afterwards becomes insolvent, the representatives of the testator's estate may prove in the insolvency proceedings, although the partnership creditors are not paid in full (*ex parte Westcott*, 30 L. T. N. S. 739; L. R. 9 Ch. App. 626).

In England, by section 103 of the Act of 1869, when one member of a firm becomes insolvent, the joint creditors of the firm have a right to prove and vote, but not to receive any dividends out of the separate estate until the separate creditors have been paid in full. Where, therefore, one member of a firm becomes insolvent, and obtains his discharge, he cannot afterwards be forced into insolvency as a member of the firm, but the insolvency proceedings must be against the continuing partners and the partnership assets (*ex parte Hammond*, 29 L. T. N. S. 72).

Where a creditor sells goods to a party who, after the sale,

forms a partnership with another person, and brings the goods into the firm, on the partnership afterwards becoming insolvent the creditor cannot claim to rank upon the partnership estate for the price of the goods sold, though the partnership got the benefit of the purchase (re *Simmons*, 20 L. C. J. 296).

This decision seems to have been given on the ground that the credit was originally given to the individual partner, and he alone was the debtor. But the creditor could surely, under the 88th section, prove against the partnership estate after payment of the creditors of the firm.

Two partners, before the passing of the Insolvent Act, assigned their joint estate and separate estates together for the benefit of their joint and separate creditors rateably and in proportion without preference or priority. An assignee, under the Act, having been afterwards appointed, filed a bill to set aside the previous assignment on the ground that to entitle the separate creditors of each partner to share rateably and in proportion with the joint creditors, not merely the separate property of their debtors, but the joint property also, and the separate property of the other assignor was a fraud on the joint creditors. But it appearing, by the evidence, that the joint estate alone was insolvent, and that the separate property of each was more than sufficient to pay the separate debts, the bill was dismissed with costs (*McDonald v. McCullum*, 11 Grant, 469).

89. The creditors, or the same proportion of them that may grant a discharge to the debtor under this Act, may allot to the insolvent, by way of allowance, any sum of money, or any property they may think proper; and the allowance so made shall be inserted in the dividend sheet, and shall be subject to contestation like any other item of collocation therein, but only on the ground of fraud or deceit in procuring it, or of the absence of consent by a sufficient proportion of the creditors.

The proportion of creditors who can grant a discharge to a debtor is a majority in number of those who have proved claims to the amount of one hundred dollars, and who represent, also, three-fourths in value of all the claims, whether above or below one hundred dollars, which have been proved (see sections 2, 4, and 59).

90. No costs incurred in suits against the insolvent after due notice has been given, according to the provisions of this Act, of an assignment, or of the issue of a writ of attachment in liquidation, shall rank upon the estate of the insolvent; but all the taxable costs incurred in proceedings against him up to that time shall be added to the demand for the recovery of which such proceedings were instituted; and shall rank upon the estate as if they formed part of the original debt, except as herein otherwise provided.

In case of an attachment, the notice referred to in this section would probably be the publication of the advertisement, form D, under section 11.

In case of an assignment the notice, form G, under section 20, would be the first notice given.

It would seem that this section renders necessary the taxation of the costs before proof is made. The costs must be taxable, and taxation is the best evidence of what costs are taxable.

91. Clerks and other persons in the employ of the insolvent in and about his business or trade shall be collocated in the dividend sheet by special privilege for any arrears of salary or wages due and unpaid to them at the time of the execution of a deed of assignment, or of the issue of a writ of attachment under this Act, not exceeding two months of such arrears, and also for such salary or wages for a period not exceeding one month of the unexpired portion of the then current year of service,—during which period they shall be bound to perform, under the direction of the assignee, any work or duty connected with the affairs of the insolvent, and which the insolvent himself might have directed them to perform under their respective engagements; and for any other claim they shall rank as ordinary creditors; and no assignee payable by commission, shall be entitled to charge for any disbursement for procuring to be performed, any service which he might properly have caused to be performed by any such clerk or other person, and for which he might otherwise charge under this Act, and no assignee whose remuneration is fixed by this Act shall be entitled to remuneration for any service or for any disbursement in respect of any service which he might properly have caused to be performed by such clerk or other person.

The 40 Vict. s. 22 amended this section by striking out of sixth line the word “three,” and substituting in lieu thereof word “two,” and by striking out of the eighth line the words “months,” and substituting in lieu thereof the words “one month” and by making the addition to the section, which is given as

The servant must be in the employ of the insolvent at the time of the assignment in order to be entitled to wages for two months, by privilege under this section, and where a servant had left his master's employ three months before the assignment, it was held, under the 67th section of the Act of 1869, that he was not entitled to the wages as a privileged claim, even though he was obliged to leave the employ because he could not get his pay (ex parte *Napier*, 3 Pugsley, 134).

This special privilege of clerks and other persons, for their arrears of wages, may be lost, or waived by their own conduct. Thus, where the clerk voluntarily left the insolvent's employ, some time before the insolvency, and took a note for the arrears of wages, it was held that he must come in with the general creditors, and had no special privilege under the 67th section of the Act of 1869 (ex parte *Napier*, 2 Pugsley, 300).

In this case, the insolvent's business was building vessels, and the clerk was employed working at vessels. He was hired by the day, and objection was taken that the Statute did not apply to clerks employed by the day, but the Court did not express an opinion on that point. Weekly or daily labourers, or workmen were held not to be within the Statute in force in England. Neither were workmen paid by the job without being hired for any specific time (ex parte *Grellier*, Mont. 264).

The language of this section seems to point to a yearly hiring. It speaks of the "then current year of service," and seems to differ in this respect from the English Act. The clerk is to be allowed for two months' wages, immediately prior to the assignment or the issue of the writ of attachment, if the wages for these two months are unpaid, and though the insolvency does not of itself operate as a dissolution of the contract of hiring (*Thomas v. Williams*, 1 Ad. & E. 685; *Hopkins v. Thomas*, 7 C. B. N. S. 711); yet, under this section, the clerk's privilege against the estate for wages, accruing after the assignment, is restricted to one month of the unexpired portion of the then current year of service. In other words, if the clerk's year of service has not expired at the time of the insolvency, he is entitled to claim one

month's wages after the insolvency, but must during such period perform any work required of him for the benefit of the estate; and it will be seen that the late act enforces the employment of the clerk or servant during such period, by depriving the assignee of any remuneration for any service which may be performed by such clerk or servant. It would seem that those claiming the privilege must be employed in or about the business or trade of the insolvent. Domestic servants would seem not entitled to this privilege.

The question has arisen in the United States whether a privileged claim can be assigned so as to entitle the assignee to the privilege; and it was held that a party who had taken an assignment of the claim as security for money advanced by him to the claimant, was entitled to the privilege to the extent of his advance, and the balance remaining, after payment of the advances, was paid to the original holder of the claim (re *Brown*, 3 B. R. 720).

The assignee is not bound to pay a privileged claim for wages before it is put on the dividend sheet (re *Cleghorn*, 2 U. C. L. J. N. S. 133).

The effect of an order directing a trustee to set apart a certain sum for the payment of preferential claims, is to sever that amount from the debtor's estate, and the trustee cannot delay the payment thereof, merely upon the ground that the balance in his hands will be insufficient to meet prospective costs (ex parte *Powis*, L. R. 17 Eq. 130; 29 L. T. N. S. 654).

92. So soon as a dividend sheet is prepared, notice thereof (Form O) shall be given by advertisement, and by letter posted to each creditor, inclosing a copy of the dividend sheet, noting the claims objected to, and after the expiry of eight days from the day of the last publication of such advertisement, all dividends which have not been objected to within that period shall be paid.

The posting of a letter to each creditor, inclosing a copy of the dividend sheet, and noting the claims objected to, was not required by the Act of 1869.

It seems that a dividend sheet will be a nullity, unless notice

thereof is given by advertisement, pursuant to the provisions of this section.

It would seem also that the decision of the Court, as to dividends, is final under section 95, unless appealed from in the manner prescribed by the Act (re *Lariviere* and *Whyte*, 11 L. C. J. 265).

It has been held by MacDonald, Co. J., that an assignee cannot, under our Statute, dispute a claim or dividend collocated by himself in a dividend sheet, advertised and unobjected to by a creditor; and it has been also held that an action will lie against an assignee for a dividend in respect of a privileged claim for wages so collocated, advertised and unobjected to (*Simpson v. Newton*, 4 U. C. L. J. N. S. 46 : MacDonald, Co. J.).

There must be some method of enforcing the payment of a dividend. This section declares that dividends not objected to shall be paid, and the assignee is the only party to pay him. It is clearly the duty of the assignee to pay the dividends, and, in all probability, the payment could be enforced by summary application under the 125th section, whether it does not exclude all other remedies.

There is no warrant in the Statute for paying dividends to creditors who have not proved their claims. On the contrary, all the sections on the subject, expressly or by necessary intendment, refer to creditors who have verified their debts in the mode required by law (re *Hoyt*, 3 B. R. 55). The declaration of a dividend fixes the rights of the creditors in respect to that particular dividend. Creditors who have not proved then, and who are not known to the assignee as creditors (see section 94) cannot participate in the dividend, although they prove previous to the payment of the money out of the hands of the assignee (re *Miller*, 1 N. Y. Leg. Obs. 180).

If the assets are more than sufficient to pay all the claims in full that have been proved against the estate, interest may be allowed up to the day of the payment of the claims respectively (re *Hogan*, 10 B. R. 383; see re *Langstaffe*, 2 Grant, 165).

93. It shall be the duty of the inspectors to examine with the assignee the claims made against the estate, and also each dividend sheet before the expiration of the delay within which the same may be objected to, and to in-

struct the assignee as to which claims or collocations should be contested by and on behalf of the estate, whereupon contestation shall be entered and made in the name of the assignee or of the inspectors or of some individual creditors consenting thereto, and shall be tried and determined by the Court or judge ; and the costs of such contestation, unless recovered from the adverse party, shall be paid out of the funds belonging to the estate.

The fact that a creditor has obtained a judgment is not conclusive evidence of debt, and it will not preclude the assignee and inspectors from enquiring whether a debt is really due (*ex parte Kibble*, L. R. 10 Ch. App. 373 ; 32 L. T. N. S. 138).

The property of goods recovered in an action of detinue remains in the creditor until execution is issued on the judgment, and he cannot prove for the value of the goods when insolvency takes place before execution issued (*ex parte Scarth*, L. R. 10 Ch. App. 234).

It has been held in England, that, when a judgment is recovered by default against a person who afterwards becomes bankrupt, proof for the amount of the judgment may be disputed. Thus, where a judgment had been recovered by default against the acceptor of certain bills of exchange, the trustee was allowed to dispute the claim on the judgment on the ground that the judgment creditor was not a holder for value of the bills (*ex parte Chatteris*, 26 L. T. N. S. 174).

94. If it appears to the assignee on his examination of the books of the insolvent, or otherwise, that the insolvent has creditors who have not taken the proceedings requisite to entitle them to be collocated, it shall be his duty to reserve dividends for such creditors according to the nature of their claims, and to notify them of such reserve, which notification may be by letter through the post, addressed to such creditors' residences as nearly as the same can be ascertained by the assignee ; and if such creditors do not file their claims and apply for such dividends previous to the declaration of the last dividend of the estate, the dividends reserved for them shall form part of such last dividend.

It is not necessary for the creditor to demand the dividend as well as file his claim, but the filing of the claim should be taken as an application under this section (*Abbott Ins. Act. 44*).

95. If any claim be objected to at any time, or if any dividend be objected to within the said period of eight days, or if any dispute arises between the creditors of the insolvent, or between him and any creditor, as to the amount of the claim of any creditor, or as to the ranking or privilege of the claim of any creditor upon such dividend sheet, the objection shall be filed in writing by or before the assignee who shall make a record thereof ; and the grounds of objections shall be distinctly stated in such writing, and the party objecting shall also file at the same time the evidence of previous service of a copy thereof on the claimant ; and the claimant shall have three days thereafter to answer the same, which time may, however, be enlarged by the judge, with a like delay to the contestant to reply ; and upon the completion of an issue upon such objection, the assignee shall transmit to the clerk of the Court the dividend sheet or a copy thereof with all the papers and documents relating to such objection or contestation ; and any party to it may fix a day, of which two days' notice shall be given to the adverse party, for proceeding to take evidence thereon before the judge, and shall thereafter proceed thereon from day to day until the evidence shall have been closed, the case heard, and the judgment rendered,—which judgment shall be final, unless appealed from in the manner hereinafter provided : the proceedings on the said objection or contestation shall form part of the records of the court, and the judgment shall be made executory as to any condemnation for costs, in the same manner as an ordinary judgment of the Court.

The facts on which the contesting party relies must be clearly set forth in his written objections, with particulars of time, place, and circumstance, and no evidence can be received on any fact not so set forth (section 114).

It was held under the 70th section of the Act of 1869, that the judge in insolvency had no power to adjudicate upon a claim until it had been decided upon by the assignee. It might, however, be brought before the judge on an appeal from the decision of the assignee, but not for the judge's decision in the first instance (*re Cleghorn*, 2 U. C. L. J. N. S. 133).

This section makes a material alteration in the procedure, in contesting claims. The judge, in the first instance, is to decide on their validity.

The 71st section of the Act of 1869 required the assignee to fix a day for proceeding to take evidence on the issue. It did not state that the appointment by the assignee of the day should be in writing; but this was, nevertheless, held necessary. In a con-



testation of a claim before the assignee, the latter verbally fixed on a convenient day for hearing and taking evidence ; the contestant inscribed the matter with due notice, and all the parties interested, including the assignee, appeared on the day fixed, and shewed their acquiescence in the regularity of the proceedings, by allowing the assignee to give an award without objection ; the proceedings were held irregular, notwithstanding the attendance, and assent of the parties (re *Davis*, 15 L. C. J. 131).

96. The creditors, and in their default the inspectors, may by resolution authorize and direct the costs of the contestation of any claim or of any dividend, to be paid out of the estate, and may make such order either before, pending, or after any such contestation ; they may also, with the sanction of the judge, authorize the payment out of the estate of any costs incurred for the general interest of the estate, whether such costs were incurred by the assignee, the inspectors, or any individual creditor.

97. If at the time of the issue of a writ of attachment, or the execution of a deed of assignment, any immovable property or real estate of the insolvent be under seizure, or in process of sale, under any writ of execution or other order of any competent court, such sale shall be proceeded with by the officer charged with the same, unless stayed by order of the judge upon application by the assignee, upon special cause shewn, and after notice to the plaintiff, reserving to the party prosecuting the sale his privileged claim on the proceeds of any subsequent sale, for such costs as he would have been entitled to out of the proceeds of the sale of such property, if made under such writ or order ; but if such sale be proceeded with, the moneys levied therefrom shall be returned into the court on whose order the sale has been made, to be distributed and paid over to the creditors who shall have any privilege, mortgage, or hypothecary claims thereon, according to the rank and priority of such claims ; and the balance of such moneys after the payment of such claims shall be ordered to be paid to the assignee to be distributed with the other assets of the estate.

Under this section, the sheriff must make his return to the Court, instead of paying the proceeds of the sale to the assignee for distribution, as required by the 74th section of the Act of 1869.

M., under a *fi. fa.* at his own suit against D., which was the first in the sheriff's hands, purchased certain lands in September, 1867. D. had, in April previous, made a voluntary assignment under the Insolvent Act of 1864, to an official assignee who claimed the proceeds of the sale under a section of the amending

Act, similar to this. M. claimed a conveyance from the sheriff, crediting the purchase money on his judgment. The Court, under these circumstances, discharged with costs an application by M., for a *mandamus* to compel the sheriff to convey, to which the assignee was no party (re *Moffatt*, 27 Q. B. U. C. 52).

98. All dividends remaining unclaimed at the time of the discharge of the assignee shall be left in the bank where they are deposited, for three years, and if still unclaimed, shall then be paid over by such bank with interest accrued thereon, to the Government of Canada, and if afterwards duly claimed shall be paid over to the persons entitled thereto, with interest at the rate of four per centum per annum from the time of the reception thereof by the Government.

99. If any balance remains of the estate of the insolvent, or of the proceeds thereof, after the payment in full of all debts due by the insolvent, such balance shall be paid over to the insolvent upon his petition to that effect, duly notified to the creditors by advertisement and granted by the judge.

#### PROCEDURE GENERALLY.

100. Whenever a meeting of creditors cannot be held, or an application made until the expiration of a delay allowed by this Act, notice of such meeting or application may be given pending such delay.

101. Notices of meetings of creditors shall be given by publication thereof for at least two weeks in the Official Gazette of the Province in which they are to take place, and by such other notice as the judge or inspectors may direct :—and in every case of a meeting of creditors the assignee shall address notices thereof to the creditors and to all the representatives within the Dominion of foreign creditors, and shall mail the same at least ten days before the day on which the meeting is to take place, the postage being prepaid by such assignee : in other cases not provided for, the assignee shall advertise as directed by the inspectors or the judge.

It seems that this section would not apply to the notice of the first meeting of the creditors under section 20, the time and manner of giving such notice being specially fixed by sections 20 and 21 of the Act.

It would seem that, under this section, the notice is not confined to creditors who have proved their debts. The notice must be sent to all known creditors (re *Mills*, 11 B. R. 117). The 21st sec-

tion requires that the notice be forwarded to every creditor mentioned in the original or any corrected or supplementary list or statement furnished by the insolvent, or who may be known to be a creditor.

The 117th section of the Act of 1869 was somewhat different from this section (see *ex parte Poulin*, 5 *Revue Legale*, 254, ante p. 205).

102. All questions discussed at meetings of creditors shall be decided by the majority, in number and in value, of the creditors having a right to vote under section two, present or represented at such meeting, unless herein otherwise specially provided; but if the majority in number do not agree with the majority in value, the views of each section of the creditors shall be embodied in resolutions, and such resolutions, with a statement of the vote taken thereon, shall be referred to the judge who shall decide between them: Provided, however, that no costs of or incidental to any such reference shall be paid out of the estate, and the decision of the judge on any reference under this section in which the resolutions referred involve the appointment of an assignee, or inspector to the estate, shall be final (40 *Vict. s. 23*).

The 40 *Vict.* (section 23) amended this section by striking out after the word "meeting" in the fourth line the words "and representing, also, the majority in value of such creditors," and by adding after the last word in the section the proviso given above.

The Legislature, by this section, did not intend to put it in the power of an insolvent to give a preference to a majority in number and value of his creditors, to the prejudice or exclusion of the minority, or to deprive the latter of all remedy if the insolvent should attempt such a preference. The judge in insolvency has a general jurisdiction in all matters coming under the Act, and this jurisdiction may be invoked in such a case as the above, and the judge may sanction a suit in the name of the assignee for the benefit of the estate if he deems it expedient to do so (*re Lambe*, 13 *Grant*, 391).

Under the Act of 1864, on the first disagreement between the majority in number and value, the meeting had to be adjourned for fifteen days, and it was only on disagreement at the adjourned meeting that the matter came before the judge.

In a case under the Act of 1864, where there was a disagreement between the majority in number and the majority in value, and the motion to adjourn was opposed by the majority in value, it was held that neither party could legally oppose the adjournment if insisted on by the other, because by doing so either party would have the power to prevent an adjudication between them by the judge, who is the referee on divisions arising (re *Lambe*, 17 C.P. U. C. 173).

103. If the first meeting of creditors, which takes place after the expiry of the period of ten days from the first advertisement calling such meeting, be called for the ordering of the affairs of the estate generally, and it be so stated in the notices calling such meeting, all the matters and things respecting which the creditors may vote, resolve or order, or which they may regulate under this Act, (except when otherwise specially provided) may be voted, resolved or ordered upon and may be regulated at such meeting, without having been specially mentioned in the notices calling such meeting,—due regard being had, however, to the proportions of creditors required by this Act for any such vote, resolution, order or regulation (40 Vict. s. 24).

The matters which usually may be decided upon on that occasion, are the following :—

1. The appointment of the assignee.
2. The security to be given by the assignee (sections 28 and 29).
3. The enactment of rules for the guidance of the assignee (section 38).
4. The appointment of inspectors and their remuneration (section 35).
5. The reception of the report of the official assignee of the estate.
6. Upon any offer of composition which may be made by the insolvent (section 35).
7. The continuance or cessation of the lease of premises occupied by the Insolvent (section 71).
8. The place where subsequent meetings are to be held (section 34).
9. The disposal of the estate of the insolvent (section 36).
10. The examination of the insolvent (section 23).

(*Wotherspoon's Ins. Act*, 152-3.)

104. The claims of creditors furnished to the Assignee in the Form P, attested under oath and accompanied by the vouchers on which they are based, or when vouchers cannot be produced, accompanied by such affidavit or other evidence as in the opinion of the Assignee shall justify the absence of such vouchers, shall be considered as proved unless contested,—in which case the claims shall be established by legal evidence on the points raised.

An assignee of a debt may prove in his own name (*ex parte Cooper*, L. R. 20 Eq. 782).

The only method of proving debts is by an affidavit filed before the assignee as required by this section (*re Stevenson*, 1 U. C. L. J. N. S. 52).

The production of vouchers was not required by the Act of 1869—under this section it will, probably, be sufficient to attach a copy of the voucher to the affidavit, and to produce and exhibit the original to the assignee, so that the latter could certify to the existence of the original and the correctness of the copy.

In England, the practice is established that it is necessary for a creditor holding a bill of exchange or other security, to produce it when he seeks to prove his debt, and he must also produce it when he comes to receive a dividend. In case by unavoidable accident or otherwise, the creditor is unable to produce the security, it seems the Court would dispense with its production (*ex parte Jacobs*, 30 L. T. N. S. 133 ; L. R. 17 Eq. 575.)

But in *re Hoare* (L. R. 18 Eq. 705) it was held sufficient for the validity of a vote for the creditor to produce the bill before the registration of the resolutions upon which he voted.

In the United States, the rule as to the production of vouchers prevails, and where the claim consists of a promissory note, the creditor must produce the note or a copy thereof (*re Northern Iron Company*, 14 B. R. 356). When a note is merged in a judgment, it need not be produced (*re Jaycox*, 7 B. R. 303).

If the affidavit refers to an annexed account, which merely gives date and amount, without stating the subject matter of the account, that is not sufficient (*re Port Huron D. D. Co.* 14 B. R. 253).

The statement of the debt in the schedule is not proof of it. It may be stated in fraud and may not exist. The insol-

vent may have made payments or may have counter-claims and set-offs. The debt must be proved by the oath of the creditor. This applies to a secured as well as an unsecured creditor (re *Bittel*, 2 B. R. 392).

The proof of a debt against a firm should state that the firm describing it by its firm name, and the individuals who composed it, were indebted to the creditor, and how and for what amount. It should not be uncertain whether the demand is a firm debt or a joint claim against the individuals who compose the firm (re *Walton*, 1 Dedy, 510). And it is also held that proof of a debt against a firm should not be included with proof against the individual members of that firm (ib.).

The proof should contain at least one full Christian name of the creditor as well as his surname (re *Valentine*, 12 B. R. 339).

In the proof of debts by a firm composed of several members, the firm is to be treated as one creditor, and any one member may act for all in proving the debt (re *Barrett*, 2 B. R. 533). A party to whom a debt has been assigned after the commencement of the proceedings can prove it, and this will include assignees by operation of law. Thus, where the creditor dies after the assignment and before proof, his executor or administrator may prove the debt.

Although a creditor, upon whose affidavit a writ of attachment issues, swears to his claim in order to support the order for the writ, yet it would seem such creditor must afterwards prove his claim under this section in the same manner as other creditors in order to be entitled to participate in the estate (re *Cornwall*, 6 B. R. 305).

Every affidavit in proof of a claim is understood to refer to the amount of the claim over and above any set-off or counter-claim of the debtor against such creditor (section 2, *h*).

Participating in the election of an assignee will not preclude a creditor from amending his proof from unsecured to secured when there is no evidence that he gained any advantage thereby, or that the other creditors have been in any way prejudiced in consequence of it, or that he was influenced by any fraudulent intent. In the absence of evidence, the presumption is that none existed (re *Mc-*

balance due by each party to the other, the fact that the bankrupt has a lien or security for the balance due to him does not interfere with the other party's right of set-off under the Statute (ex parte *Barnett*, L. R. 9 Ch. App. 293 ; 29 L. T. N. S. 858). In order, however, to establish a right of set off, on the basis of mutual credits between the parties, there must be an actual bankruptcy, and the assignment by the several partners of a firm is not sufficient to establish the right of set-off against their trustees, or to bind the joint estate (*London B. and M. B. v. Narraway*, L. R. 15 Eq. 93).

The right of set-off in insolvency depends on the party claiming to exercise the right having the beneficial interest. Where it appeared that the plaintiff claimed a right to set-off certain bills against the proceeds of a promissory note which were claimed to be retained by the defendants, and it appeared that they were not the *bona fide* holders of the bills, but had got possession of them for the purpose of establishing the set-off, and were under an engagement to re-deliver to the real holders, in case the claim to set-off failed, the bill was dismissed with costs (ib.).

It has been held in England that a claim for unliquidated damages arising out of contract, is a proper subject for set-off, under section 39 of the Act, before referred to, which speaks of other mutual dealings (*Booth v. Hutchinson*, L. R. 15 Eq. 30 ; 27 L. T. N. S. 600).

As a general rule, for the purposes of set-off, each of the parties must be debtor and creditor in the same right (*Freeman v. Lomas*, 9 Hare, 109, 114 ; see as to set off in equity, *Middleton v. Pollock*, L. R. 20 Eq. 29) ; but there are exceptions to this rule, as in the case of a factor selling goods as his own without disclosing his principal (*George v. Clagett*, 7 T. R. 359). So, also, debts in separate rights may be set off by special agreement (*Cuxon v. Chadley*, 1 C. & P. 174). But a debt due to a testator cannot be set-off against a debt owing by his executor (*Stammers v. Elliott*, L. R. 3 Ch. App. 195 ; see, also, *Armstrong v. Armstrong*, L. R. 12 Eq. 614). Where a person as executor and residuary legatee had a balance in the hands of bankers, he was allowed to set off in an action by the trustee of the bankers, for

to the assignee, or he shall by his affidavit for the issue of a writ of attachment, or by an affidavit filed with the assignee at any time before the declaration of a final dividend, set a value upon such security; and from the time he shall have so released or delivered up such security, or shall have furnished such affidavit, the debt to which such security applied shall be considered as an unsecured debt of the estate or as being secured only to the extent of the value set upon such security; and the creditor may rank as and exercise all the rights of an ordinary creditor, for the amount of his claim, or to the extent only of any balance thereof above and beyond the value set upon such security, as the case may be. 701 3 10 144 19

This section enables a secured creditor to change the nature of his claim from secured to unsecured, and in the latter case gives him the rights of an ordinary creditor.

107. The law of set-off, as administered by the courts whether of law or equity, shall apply to all claims in insolvency and also to all suits instituted by an Assignee for the recovery of debts due to the insolvent, in the same manner and to the same extent, as if the insolvent were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this Act respecting frauds or fraudulent preferences.

If the circumstances are such, that a set-off would have been allowed, had no assignment taken place, the assignment will not affect the right to set-off; for, after the assignment, the assignee stands in the same position as the insolvent. Thus where apart from the insolvency of the defendant, the plaintiff had a right to set-off certain costs due from the defendant against a debt due from the plaintiff, it was held, that he possessed the same right of set-off against the assignee (*Brigham v. Smith*, 17 Grant, 512).

Under the 135th section of the Act, a transfer of a debt due by the insolvent for the purpose of enabling the debtor to set up, by way of set-off, the debt so transferred is, under certain circumstances, null and void.

In England, the 39th section of the Act of 1869 provides that where there are mutual credits or mutual debts or other mutual dealings, the balance only shall be claimed or paid on each side respectively. Where there have been mutual credits between a bankrupt and a person claiming to prove a debt under his bankruptcy, and at the commencement of the bankruptcy there is a



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a deposit made by the insolvent, and need not pay such deposit to the assignee (re *Petrie*, 7 B. R. 332).

A creditor, who, at the time of the insolvency, has in his hands goods or chattels of the insolvent, with a power of sale, or chooses in action with a power of collection, may sell the goods or collect the claims, and set them off against the debt the insolvent owes him (re *Dow*, 14 B. R. 307).

If a banker, in the regular course of business, receives drafts for collection, he may retain the amount so collected to pay an indebtedness due to him, although the money was collected after the commencement of the proceedings in insolvency (re *Farnsworth*, 14 B. R. 148). A stockholder cannot set-off a claim held by him upon the corporation, against a demand for an unpaid subscription for stock. The debts are not mutual. The debt due on the subscription is a trust fund, devoted to the payment of all the creditors of the company. As soon as the company becomes insolvent, and the fact becomes known to the stockholders, the right of set-off for an ordinary debt to its full amount ceases (*Sawyer v. Hoag*, 9 B. R. 145; *Jenkins v. Armour*, 14 B. R. 276).

Proving the entire debt in the proceedings in insolvency without offering to abate the claim by any set-off which the creditor may have, is a waiver of the right to do so, and an election to proceed on such claim alone in the insolvency proceedings, and the subsequent assertion of part of the same debt by a plea of set-off in an action against the creditor, is equivalent to the prosecution of an original suit upon the claim, against the prohibition of the insolvent law (*Brown v. Farmers' Bank*, 6 Bush. 198; *Russell v. Owen*, 61 Mo. 185).

103. Except when otherwise provided by this Act, one clear juridical day's notice of any petition, motion, order or rule, shall be sufficient if the party notified resides within fifteen miles of the place where the proceeding is to be taken, and one extra day shall be sufficient allowance for each additional fifteen miles of distance between the place of service and the place of proceeding; and service of such notice shall be made in such manner as is now prescribed for similar services in the Province within which the service is made.

One clear day's notice, under this section, excludes the day of service and the day of hearing, so that a service on the 23rd for

for hearing on the 24th, would be insufficient. The service should be on the 23rd for a hearing on the 25th. But where a notice was served on the 23rd for hearing on the 24th, the Court, on the authority of *re Owens* (12 Grant, 446), and in favour of the liberty of the subject, allowed the notice to be amended (*re Davidson*, 4 U. C. P. R. 153 ; 3 U. C. L. J. N. S. 318).

The service is to be in the manner prescribed for similar services in the Province, within which the service is made. But there is nothing in the Act requiring a petition or motion to be served at any particular hour, and where a petition was served on Saturday, returnable on the following Tuesday, and it did not appear at what hour of the day it was served, it was nevertheless held sufficient to give the party one clear day's notice, as required by this section (*Hillborn v. Mills*, 5 U. C. L. J. N. S. 41 ; *Hughes, Co. J* ; see the 18th Rule of Practice in Quebec).

109. The judge shall have the same power and authority in respect of the issuing and dealing with commissions for the examination of witnesses, as are possessed by the ordinary courts of record in the Province in which the proceedings are being carried on.

The issue of commissions in Ontario is regulated by the Con. Stats. U. C. chap. 32.

110. In any proceeding or contestation in insolvency, the Court or judge, may order a writ of *subpoena ad testificandum* or of *subpoena duces tecum* to issue, commanding the attendance as a witness of any person within the limits of Canada.

111. All rules, writs of subpoena, orders and warrants issued by any court or judge in any matter or proceeding under this Act, may be validly served in any part of Canada upon the party affected or to be affected thereby ; and the service of them, or any of them, may be validly made in such manner as is now prescribed for similar services in the Province within which the service is made ; and the person charged with such service shall make his return thereof under oath, or, if a sheriff or bailiff in the Province of Quebec, may make such return under his oath of office.

112. In case any person so served with a writ of *subpoena* or with an order to appear for examination, does not appear according to the exigency of such writ or process, the Court or the judge on whose order or within the limits of whose territorial jurisdiction the same is issued, may, upon proof made of the service thereof, and of such default, if the person served therewith has his

domicile within the limits of the Province within which such writ or process issued, constrain such person to appear and testify, and punish him for non-appearance or for not testifying in the same manner as if such person had been summoned as a witness before such Court or judge in an ordinary suit ; and if the person so served and making default, has his domicile beyond the limits of the Province within which such writ or process issued, such Court or judge may transmit a certificate of such default to any of Her Majesty's superior Courts of law or equity in that part of Canada in which the person so served resides, and the Court to which such certificate is sent, shall thereupon proceed against and punish such person so having made default, in like manner as it might have done if such person had neglected or refused to appear to a writ of *subpoena* or other similar process issued out of such last mentioned Court ; and such certificate of default attested by the Court, judge or assignee before whom default was made, and copies of such writ or process and of the return of service thereof certified by the clerk of the Court in which the order for transmission is made, shall be *prima facie* proof of such writ or process, service, return, and of such default.

These sections it will be observed, provide the means by which the attendance of a witness may be compelled if he is served in any Province of the Dominion.

113. No such certificate of default shall be so transmitted nor shall any person be punished for neglect or refusal to attend for examination in obedience to any *subpoena* or other similar process, unless it be made to appear to the Court or judge transmitting, and also to the Court receiving such certificate, that a reasonable and sufficient sum of money, according to the rate *per diem* and per mile, allowed to witnesses by the law and practice of the superior courts of law within the jurisdiction of which such person was found, to defray the expenses of coming and attending to give evidence, and of returning from giving evidence, had been tendered to such person at the time when the writ of *subpoena*, or other similar process, was served upon him.

114. The forms appended to this Act, or other forms in equivalent terms, shall be used in the proceedings for which such forms are provided ; and in every contestation of a claim, collocation or dividend, or of an application for a discharge, or for confirming or annulling a discharge, the facts upon which the contesting party relies shall be set forth in detail, with particulars of time, place and circumstance ; and no evidence shall be received upon any fact, not so set forth : but in every petition, application, motion, contestation or other pleading under this Act, the parties may state the facts upon which they rely, in plain and concise language, to the interpretation of which the rules of construction applicable to such language in the ordinary transactions of life shall apply.

An assignment not according to the provisions of the Insolvent Act is void under this section (*Calvin v. Tranchemontagne*, 14 L. C. J. 210).

Under the "Interpretation Act" (31 Vict. chap. 1, s. 7), "Thirty-firstly: Where forms are prescribed, slight deviations therefrom, not affecting the substance or calculated to mislead, shall not vitiate them.

See, as to manner of entitling affidavits for attachment, *Sharp v. Matthews* (5 P. R. U. C. 10).

115. No plea or exception alleging or setting up any discharge or certificate of discharge, granted under the bankrupt or insolvent law of any country whatsoever beyond the limits of the Dominion, shall be a valid defence or bar to any action instituted in any Court of competent jurisdiction in the Dominion, for the recovery of any debt or obligation contracted within such limits.

A foreign law authorizing the discharge of an insolvent debtor must be directly proved, and the Court will not listen to an application for the discharge of such person after he has allowed judgment to go by default and is in execution (*Brown v. Hudson*, Taylor, 346; *MacMahon's Ins. Act*, 172).

Though the holder of a note has proved for the amount thereof, under a sequestration issued against his debtor, the maker, in Glasgow, under the "Scottish Bankrupt Act of 1856," he may, nevertheless, maintain an action in this country against the maker of the note, if he carries on business here and in Scotland, and the proof will be no bar to an action commenced during the pendency of the bankruptcy proceedings, and before final discharge (*Robinson v. McKeand*, 23 Q. B. U. C. 359; see also *Foster v. Taylor*, 31 Q. B. U. C. 24).

In a case reported in Peter's Reports (Prince Edward Island), p. 27, it is laid down that there is no doubt of the power of the Imperial Parliament to bind the Colonies where an act shows a clear intention to do so, and the Court thought it clear that a certificate of bankruptcy obtained in England would be a bar in the colonial Court to a debt contracted there. In the case in question, however, it was held that the Imperial Act (5 & 6 Vict.

chap. 122, s. 28) did not extend to the Colony. A similar decision was rendered in *Gilbert v. McLean* (2 Hannay, 213), where defendant was arrested for a debt due on a bond, and it appeared that after the debt was contracted he had become a bankrupt, and received his discharge under the "Bankruptcy (Scotland) Act, 1856," and the Court ordered his discharge on entering a common appearance.

A debt or liability arising in any country may be discharged by the laws of that country, and such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the Courts of that country, but in every other country. But the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country. Where the discharge is created by the Legislature or laws of a country which has a paramount jurisdiction over another country in which the debt or liability arose, or by the Legislature or laws which govern the tribunal in which the question is to be decided, such a discharge may be effectual in both countries in the one case, or on proceedings before the tribunal in the other case. Where, therefore, a contract was made, and was to be performed in Canada, a discharge obtained in England, after breach of the contract, was held a good answer to an action in the English Courts, and the Court also expressed an opinion that the discharge would bar an action in Canada, on the ground that it derives its force from a paramount jurisdiction, the Imperial Parliament (*Ellis v. McHenry*, L. R. 6 C. P. 228 ; 23 L. T. N. S. 861 ; see also *McDonald v. Georgian Bay L. Co.* 24 Grant, 356 ; *Smiles v. Belford*, 23 Grant, 590).

116. The rules of procedure as to amendments of pleadings, which may be in force at any place where any proceedings under this Act are being carried on, shall apply to all proceedings under this Act ; and any Court or judge, or assignee, before whom any such proceedings are being carried on, shall have full power and authority to apply the appropriate rules as to amendments, to the proceedings so pending before him ; and no pleading or proceeding shall be void by reason of any irregularity or default which can or may be amended under the rules and practice of the Court.

117. The death of the insolvent, pending proceedings in liquidation, shall not affect such proceedings, or impede the winding up of his estate ; and his heirs or other legal representatives may continue the proceedings on his behalf to the procuring of a discharge, or of the confirmation thereof, or of both ; and the provisions of this Act shall apply to the heirs, administrators, or other legal representatives of any deceased person who, if living, would be subject to its provisions, but only in their capacity as such heirs, administrators, or representatives, without their being held to be liable for the debts of the deceased to any greater extent than they would have been if this Act had not been passed.

Primary proceedings in insolvency cannot be taken against executors as such. The object of this Act was merely to authorize proceedings to be carried on against the representatives of a deceased insolvent, and its provisions all relate to the case of the death of an insolvent pending proceedings in insolvency. The object of the section is that, notwithstanding the death, proceedings may be carried on by the assignee or by the representatives of the insolvent, if either deem it advisable to proceed. But the personal representatives cannot be made insolvent in their character as such, though they are guilty of delay in paying debts due by the deceased, or even of negligence in collecting the debts, and where a writ of attachment issued against an executor, as such it was set aside, though the circumstances were such that if the executor were a trader within the Act, he would have clearly committed an act of bankruptcy under section 3[k], by not satisfying an execution (re *Sharpe*, 20 C. P. U. C. 82).

This section only signifies that the death of the insolvent shall not affect the proceedings if a personal representative is appointed, and it expressly requires that any persons who wish, on behalf of the insolvent, to interfere in the proceedings in insolvency on behalf of the estate of the debtor, must be clothed with authority to act as his legal representative. When, therefore, an insolvent appealed from the decision of a county judge refusing to set aside an attachment against him, and died during the pendency of the appeal, and no personal representative was appointed, the appeal was held to fail (*Laurie v. McMahon*, 6 P. R. U. C. 9).

118. The costs of the proceedings in insolvency up to and inclusive of the notice of the appointment of the assignee, shall be paid by privilege as a first



charge upon the assets of the insolvent; the disbursements necessary for winding up the estate shall be the next charge on the property chargeable with any mortgage, hypothec, or lien, and upon the unincumbered assets of the estate respectively, in such proportions as may be justified by the nature of such disbursements, and their relation to the property as being incumbered or not, as the case may be; and the remuneration of the assignee and the costs of the discharge of the assignee being first taxed by the proper taxing officer at the tariff rate, or if there be no tariff, at the same rate as is usual for uncontested proceedings of a similar character, after notice to the inspectors, or to at least three creditors, shall also be paid therefrom as the last privileged charge thereon. But no portion of the assets or property chargeable with any mortgage, hypothec or lien for any claim not provable on the estate shall be liable for any other but their proportion of costs necessarily incurred in realizing such assets and property, except what may remain after payment of such mortgage or lien.

The 40 Vict. (s. 24) amended this section by striking out the words "and the costs of the judgment of confirmation of the discharge of the insolvent, except when such confirmation is upon a deed of composition or of the discharge, if obtained direct from the Court" (see also 40 Vict. s. 36).

Under the 49th section, the insolvent must pay the costs of a deed of composition, but prior to the late Act the costs of discharge, under section 64, or of confirming a consent to a discharge, were payable out of the estate. Now the insolvent must pay the costs of obtaining his discharge in all cases.

Under the Act of 1864, the lien of the landlord for rent on the proceeds of goods found on the demised premises had priority over the privilege of the assignee and the insolvent for the costs of their respective discharges (*Morgan v. Whyte*, 13 L. C. J. 187; 5 U. C. L. J. N. S. 298).

The term "assets" in this section means assets which belong to the insolvent beneficially, and which pass to the assignee for the benefit of the general creditors. No privilege can be claimed against property of which the insolvent was trustee, or was wrongfully in possession, or which belonged to others. The privilege has not priority over valid incumbrances on the property, and in case of such incumbrances, only the equity of redemption can be assets (re *Stewart*, 3 Ch. Cham. 95).

In the Province of Quebec the prothonotary should not allow, on a contestation of the insolvent's application for discharge, a fee on articulation of facts or on appearance as counsel at enquête, under the tariff in force under the Insolvent Act of 1869 (re *Inglis*, 20 L. C. J. 184).

119. The judge shall have the power, upon special cause being shewn before him under oath for so doing, to order any postmaster at the place of residence or at the place of business of the insolvent to deliver letters addressed to him at such post office to the assignee, and to authorize the assignee to open such letters in the presence of the prothonotary or clerk of the Court of which such judge is a member, and in the presence of the insolvent or after notice given to him by letter through the post, if he be within the Province; and if such letters be upon the business of the estate the assignee shall retain them, giving communication of them, however, to the insolvent on request; and if they be not on the business of the estate they shall be resealed, endorsed as having been opened by the assignee and given to the insolvent or returned to the post office; and a memorandum in writing of the doings of the assignee in respect of such letters, shall be made and signed by him and by the prothonotary or clerk, and deposited in the Court.

120. All causes of disqualification applying to a judge in civil matters in the several Provinces to which this Act applies, shall be causes of disqualification and recusation under this Act, as regards the final hearing and determination of any matter subject to appeal or revision under this Act; but such grounds of disqualification shall not apply to mere ministerial acts or incidental proceedings; and such causes of disqualification shall be tried as provided for by the laws in force in the several Provinces where the proceedings are pending. If a judge be disqualified or incompetent to act in any matter in insolvency under this section, the judge competent to act in matters of insolvency in a county or district adjoining that in which the proceedings are pending (or in the case of a Judge of the Court of Probate in Nova Scotia, the judge of the said Court in an adjoining county) and who is not disqualified under this section shall be the judge who shall have jurisdiction in such matter in the place of the judge so disqualified.

Although there is no provision in the Insolvent Act for the recusation, properly so called, of an assignee who is deciding on a contested claim, yet on a petition by the claimant alleging facts which he claims to be legal grounds of recusation of the assignee, and claiming to be allowed to recuse the assignee, the judge will order the assignee to suspend all further proceedings, and order

proof of the facts alleged in the petition (*Worthington and Ball*, 17 L. C. J. 169).

In the Province of Quebec, it has been held that, the assignee to an insolvent estate, is not a judge within the meaning of article 176 of the Code of Civil Procedure, and, therefore, cannot be recused in the mode prescribed by the code for the recusation of a judge. Proceedings to disqualify an assignee, under the Insolvent Act of 1869, must be taken in the mode prescribed by section 137 of the Act (*Mechanics' Bank v. Brown*, 19 L. C. J. 295.)

121. In the absence of the judge from the chief place of any district in the Province of Quebec, the prothonotary of the Court shall preside at the meetings of creditors called to take place before the judge, and shall take minutes of the proceedings of the same, and shall in such cases as well as in all others, make any order which the judge is empowered to make; but the same shall not be delivered nor put into execution if any objection to it is filed with the prothonotary, the same day or the next after, and then the whole matter and all the papers and proceedings, produced and had at such meeting shall be referred to the judge, who shall adjudicate upon the same, confirming the order made by the prothonotary, or making such other as he may think best in the case.

122. In the Province of Quebec, rules of practice for regulating the due conduct of proceedings under this Act, before the court or judge, and tariffs of fees for the officers of the court and for the advocates and attorneys practising in relation to such proceedings, or for any service performed or work done for which costs are allowed by this Act (but the amount whereof is not hereby fixed), shall be made forthwith after the passing of this Act, and when necessary repealed or amended, and shall be promulgated under or by the same authority and in the same manner as the rules of practice and tariff of fees of the Superior Court, and shall apply in the same manner, and have the same effect in respect of proceedings under this Act as the rules of practice and tariff of fees of the Superior Court apply to and affect proceedings before that Court; and bills of costs upon proceedings under this Act may be taxed and proceeded upon in like manner as bills of costs may now be taxed and proceeded upon in the said Superior Court.

In Quebec no rules have yet been made under this section. The rules framed under the former Acts will be found in the appendix.

123. In the Province of Ontario, the Judges of the Court of Appeal or a majority of them; in the Province of New Brunswick, the Judges of the Supreme

Court of New Brunswick, or the majority of them ; in the Province of Nova Scotia, the Judges of the Supreme Court of Nova Scotia, or the majority of them ; in the Province of British Columbia, the Judges of the Supreme Court, or the majority of them ; in the Province of Prince Edward Island, the Judges of the Supreme Court, or the majority of them ; and in the Province of Manitoba, the Judges of the Court of Queen's Bench, or a majority of them ; shall forthwith make and frame and settle the forms, rules and regulations to be followed and observed in the said Provinces respectively, in proceedings in insolvency under this Act, and shall fix and settle the costs, fees and charges which shall or may be had, taken or paid in all such cases by or to attorneys, solicitors, counsel, and officers of courts, whether for the officer or for the Crown as a fee for the fee fund or otherwise, and by or to sheriffs, assignees or other persons whom it may be necessary to provide for, or for any service performed or work done for which costs are allowed by this Act, but the amount whereof is not hereby fixed.

The 40 Vict. s. 26 amended this section as to Ontario by making it the duty of the Judges of the Court of Appeal or a majority of them to frame and settle the rules, forms and regulations under the Act.

No rules have yet been promulgated under this section in any of the Provinces.

124. Until such rules of practice and tariff of fees have been made, as required by the two preceding sections, the rules of practice and tariff of fees of insolvency, now in force in the said Provinces respectively, shall continue and remain in full force and effect.

125. Every assignee shall be subject to the summary jurisdiction of the Court or judge in the same manner and to the same extent as the ordinary officers of the court are subject to its jurisdiction ; and the performance of his duties may be compelled, and all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien or right of property upon, in or to any effects or property in the hands, possession or custody of an assignee, may be obtained by an order of the judge on summary petition in vacation, or of the court on a rule in term, and not by any suit, attachment, opposition, seizure or other proceeding of any kind whatever ; and obedience by the assignee to such order may be enforced by such Court or judge under the penalty of imprisonment, as for contempt of court or disobedience thereto, or he may be removed in the discretion of the Court or judge from the assigneeship of the estate.

*section 19. as to suits by assignees.*

The 40 Vict. s. 27 amended this section by striking out the

words "if not an official assignee" and adding at the end of the section the words "from the assigneeship of the estate."

The British North America Act must be presumed to have been passed as Acts of Parliament always are presumed to have been passed, with a knowledge by the Legislature of the then existing law, and of the decisions of the Courts upon the matter which is the subject of legislation, and as an enactment somewhat similar to this section was in force when the British North America Act was passed, this section of the Act is not beyond the power of the Dominion Parliament as being an interference with property and civil rights (*Crombie v. Jackson*, 34 Q. B. U. C. 575).

The object of this section is to establish a special tribunal in the first instance, for the disposal of such matters, for the benefit of the debtor and the creditors, to prevent litigation being carried on by any one prejudicial to the estate; to prevent the assets being dissipated by law suits, and to have all such matters decided upon promptly by a summary petition, presentable at any time to the Insolvent Court or to a judge of it, and specific relief afforded at once, if the applicant is entitled to it, under pressure of very severe punishment. Where a party who had mortgaged his goods to the plaintiff, made an assignment in insolvency, and at the time of making the assignment the insolvent was in possession of the goods assigned, and the possession was transferred to the assignee, who took possession of, but did not in any way interfere with the goods, except in his capacity as assignee: it was held that the plaintiff, the mortgagee of the goods could not maintain trover against the assignee, for he was not a wrong doer by simply taking possession of the goods assigned, and the plaintiff's remedy, if any, was held to be by summary application under this section (*Crombie v. Jackson*, 34 Q. B. U. C. 575).

The decision in this case rested on the ground that the assignee merely held for the benefit of the creditors the possession which he obtained rightfully, under the assignment. Where goods mortgaged remain in the actual possession of the mortgagor, after default in payment, and are by the latter or by the sheriff, assigned to an assignee in insolvency, the mortgagee cannot en-

force any claim for a right of property to the goods in the possession of the assignee by a suit at law. In such case the mortgagee will be bound to proceed against the assignee, under this section of the Act (*Dunble v. White*, 32 Q. B. U. C. 601).

This section seems to apply to proceedings between creditors, parties to the insolvency proceedings, or who have it in their power to become parties thereto. It does not prevent a person who is not a creditor at all, and whose property, lands, goods, money, and other effects, have been wrongfully taken, as the property of the debtor, from pressing his redress in the ordinary courts of law. And, a mortgagee of goods who is entitled to the immediate possession of them, may bring an action of trespass against the assignee for a wrongful taking of them, and is not obliged to apply to the judge on summary petition, as pointed out in this section. But creditors who have proved, or who can prove, on the estate, although they have not made themselves parties to the insolvency, are bound by the section, and can only seek redress against the assignee as therein provided (*Archibald v. Haldan*, 30 Q. B. U. C. 30) where the assignee has not been guilty of any illegal or wrongful act, and it seems the assignee would not be protected by this section if he wrongfully converts or disposes of the property of a creditor.

The assignee is not a public officer under the Con. Stats. U. C. chap. 126, and is therefore not entitled to notice of action (ib.).

In New Brunswick, it has been held, that if property claimed by a third person has been attached as the property of an insolvent, under a warrant issued under the 20th section of the Act of 1869, such person has no right to apply, under section 50, to set aside the attachment, or to have the property restored to him by the assignee, he must resort to his Common Law remedy (*Clementson v. Hammond*, East. T. 1871; Stephen's Digest, N. B. Reports, 227).

But this section does not apply as against a person who is not a creditor of the insolvent, and where the goods of A. were seized by the sheriff under an execution against B., and were afterwards delivered by the sheriff to the official assignee of B., it was held that A. was not driven to an application under this sec-

tion, but might maintain replevin against the official assignee for the goods (*Burke v. McWhirter*, 35 Q. B. U. C. 1).

This case is an express decision on two points, namely, that this section does not apply to a person who is not a creditor of the insolvent, and has nothing to do with the distribution of his estate, and secondly, that goods may be replevied out of the custody of an assignee in insolvency. On the latter point it follows *Jamieson v. Kerr* (8 C. L. J. N. S. 241; 6 P. R. U. C. 3); in which it was held that goods are repleviable out of the hands of a guardian in insolvency, notwithstanding the Replevin Act in Ontario provides, that nothing therein contained shall authorize the replevying of, or taking out of the custody of any sheriff or other officer, any personal property seized by him under any process issued out of any Court of Record for Ontario (Con. Stat. U. C. chap. 29, s. 2).

The foregoing case was on the Act of 1869, and on the latter Act it has been held, in the Province of New Brunswick, that replevin will not lie against an assignee in insolvency to recover property seized by him, on the ground that, under this section of the Act, the remedy by action is taken away, and that the proper proceeding is an application to the judge for an order for the delivery of the goods (*McGuirk v. McLeod*, 2 Pugsley, 323). The point as to the goods being in the custody of the law was raised on the argument, but the court gave no opinion thereon.

Sections 9, 12 and 28 of the present Act change the position of the official assignee from what it was under the former Act. In reference to the property of the insolvent seized under a writ of attachment, the official assignee stands in the same position as a sheriff seizing goods on execution from a Court of Record. In Ontario, where this Statute already cited is in force, it has been held that an official assignee appointed under the Act, is an officer within the meaning of the said Statute, and that goods in his possession as such assignee seized under a writ of attachment cannot be replevied (*Barclay v. Sutton*, 7 P. R. U. C. 14). In this case the goods were seized by the assignee under a writ of attachment, and where the goods vest in the assignee under an

assignment made by the debtor after demand, it is doubtful whether the same rule will apply.

Although this section will, as we have seen, protect an assignee when acting strictly in the discharge of his duty as assignee, yet when the proceeding is in *rem* against property, and not against the assignee for something in discharge of his duty, the section does not apply.

A mortgagee seeking to enforce his mortgage by bill of foreclosure after default in payment, does not come, as a creditor, asking payment out of the assets of the estate, but he asks that, within a specified time, the mortgagor shall redeem his mortgage, otherwise the equity of redemption will be barred. The Insolvent Court has no machinery for calling in claimants for service out of the jurisdiction, and for working out all the details of a foreclosure suit. Therefore, it has been held that the jurisdiction of the Court of Chancery to decree foreclosure upon a mortgage where the mortgagor has made an assignment in insolvency, after the date of the mortgage, is not taken away by this section, and the mortgagee must still proceed in Chancery to obtain such relief against the assignee of the mortgagor (*Henderson v. Kerr*, 22 Grant, 91).

The interest of a mortgagee of real property does not pass to the assignee of the mortgagor, for it is not, in fact, the property of the insolvent, the mortgagee being the legal owner; therefore, if a mortgagor become insolvent, the mortgagee is not obliged to file a claim under the Act, but may proceed to sell the property under the power of sale in his mortgage (*Gordon v. Ross*, 1 U. C. L. J. N. S. 106; 11 Grant, 124); or, it is presumed, exercise any other remedy to which he would be entitled, had no insolvency intervened, for the insolvency of the mortgagor does not abridge or destroy the powers and privileges of the mortgagee (see also *Coulthurst v. Smith*, 29 L. T. N. S. 243; *ib.* 714). So, a court of equity has power to order a sale of the mortgaged property, the Insolvent Court not being competent to give adequate relief.

A creditor having taken security by mortgage on real estate, the mortgagor afterwards became insolvent, and the creditor filed a claim, placing a certain value on the mortgage security, and



seeking to rank on the estate for the balance of the debt. It was afterwards discovered that certain property intended to be included in the mortgage security had, by mutual mistake, been omitted therefrom. Whereupon, the creditors, the mortgagee, filed a bill in Chancery to have the mortgage rectified and the security realized. It was held that the mortgagee having so proceeded in insolvency, formed no objection to the relief asked, and the Court ordered a rectification of the instrument as prayed. It was further held that the Insolvent Court had not exclusive jurisdiction under this section, as the relief asked was *dehors* the administration of the assets in that Court and the latter Court could not give adequate relief in respect of the same (*Cameron v. Kerr*, 23 Grant, 374; see also *Stone v. Thomas*, L. R. 5 Ch. App. 219.) The foregoing cases at common law were all cited in the judgment in *Henderson v. Kerr* (22 Grant, 91). The court also declared that the decision in the case would not interfere with the right of the assignee to proceed and sell an equity of redemption which had passed to him as assignee.

In England, the Court of Bankruptcy will restrain the mortgagee from proceeding in the Court of Chancery, if it appear more convenient that the sale should take place under the direction of the Court of Bankruptcy (*White v. Simmons*, L. R. 6 Ch. 655).

A writ of attachment issued, under which the assignee in insolvency seized goods, which were claimed by a person to whom it was alleged the debtor had transferred them. The assignee thereupon filed a bill of interpleader against the claimant, and the creditors who had sued out the writ. The Court held that the assignee was not compelled to apply to the judge in insolvency under this section, and relief was afforded to the assignee, and the claimant failing to appear was ordered to be debarred of all interest in the goods in question, and to pay the costs of suit, and the assignee was given a lien on the goods in his hands for his costs (*Wells v. Hews*, 13 C. L. J. N. S. 21; 24 Grant, 131).

The Insolvent Court is the proper Court to apply to in order to compel the assignee to perform his duties properly, and under this section the jurisdiction of the other Courts of law is excluded,

and recourse must be had to the judge in insolvency as pointed out in this section. If, for instance, a sale by an assignee in insolvency is open to objection on the part of creditors, the remedy of the latter is by an application to the Insolvent Court, and not by a suit in Chancery or an action in the Superior or other Courts of law (*O'Rielly v. Rose*, 18 Grant, 33).

A judge of the Insolvent Court has power, under this section of the Act, to make an order that the defendant, the assignee of the estate of H. L. pay to the plaintiff, the assignee of the estate of A. L. the proceeds of the sale of a lease which belonged to the estate of A. L., but which the defendant improperly sold as belonging to the estate of H. L. In this case there was an alleged assignment of the lease from A. L. to H. L., and it was contended that the judge had no power on a summary application under this section to set aside the assignment, as such proceedings could only be in a Court of Equity. It was agreed, however, between both parties that the defendant should sell the unexpired term in the lease, and hold the proceeds subject to such order as the judge should make, and under these circumstances it was held that the judge had power to make the order under this section (*Skinner v. McLeod*, 2 Pugsley, 131).

Had the lease not been sold, the plaintiff as the assignee of A. L. would have had the right, under the 39th section of the Act, to take proceedings to set aside the alleged assignment and obtain possession of the property. Had it been sold and converted into money, he probably might have maintained an action for money had and received against H. L. if he had sold the property (ib. 135, per Ritchie, C. J.; see *Marks v. Feldman*, L. R. 5 Q. B. 275).

The power given to the judge by this section to control the assignee, is in the nature of giving him personal directions as to his duties enforceable by imprisonment on default, but the judge has no power to enforce his orders by execution against the goods of the assignee, though the judge may possibly compel the assignee to pay the costs incurred by his disobedience, by making it a condition that they shall be paid before the contempt is purged (re *Claghorn*, 2 U. C. L. J. N. S. 133).

On a summary application on petition under this section of the

Act, for the delivery to the real owner of property, seized under an attachment in insolvency, it is not necessary that the petition or affidavit should be entitled in the cause. Such an application may be made while the property is in the hands of the guardian, and before its delivery to the real owner) re *Pyke*, 9 C. L. J. N. S. 314).

If a debtor has no assets, and wishes to assign, merely to defeat the claim of a creditor who is suing him, an assignee would be guilty of fraud in accepting such assignment, and in taking money in advance from the debtor, or security to recompense him for his services. In such case, the assignee would be subject to the summary jurisdiction of the Court, who would punish such conduct, besides enforcing restitution of the money unlawfully taken from the insolvent's assets (*Thomas v. Hall*, 6 P. R. U. C. 172).

126. In the Province of Quebec every trader having a marriage contract with his wife, by which he gives or promises to give or pay or cause to be paid, any right, thing, or sum of money, shall enregister the same, if it be not already enregistered, within three months from the execution thereof; and every person not a trader, but hereafter becoming a trader, and having such a contract of marriage with his wife, shall cause such contract to be enregistered as aforesaid (if it be not previously thereto enregistered), within thirty days from becoming such trader; and in default of such registration the wife shall not be permitted to avail herself of its provisions in any claim upon the estate of such insolvent for any advantage conferred upon or promised to her by its terms; nor shall she be deprived by reason of its provisions of any advantage or right upon the estate of her husband, to which, in the absence of any such contract, she would have been entitled by law; but this section shall be held to be only a continuance of the second sub-section of section twelve of the "Insolvent Act of 1864," and of section one hundred and forty of the "Insolvent Act of 1869," and shall not relieve any person from the consequence of any negligence in the observance of the provisions of the said sub-section or section.

#### IMPRISONMENT FOR DEBT.



127. Any debtor confined in gaol or on the limits in any civil suit, who may have made the assignment provided for in this Act, or against whom process for liquidation under this Act may have been issued may, at any time after the meeting of creditors provided for in this Act, make application to the judge of the county or district in which his domicile may be or

in which the gaol may be in which he is confined, for his discharge from imprisonment or confinement in such suit ; and thereupon such judge may grant an order in writing directing the sheriff or gaoler to bring the debtor before him for examination at such time and place in such county or district as may be thought fit ; and the said sheriff or gaoler shall duly obey such order, and shall not be liable to any action for escape in consequence thereof, or to any action for the escape of the said debtor from his custody, unless the same shall have happened through his default or negligence ; or if the debtor is confined in the county or district in which the judge does not reside, the judge instead of ordering the debtor to be brought before him for examination may, if he sees fit, make an order authorizing and directing the official assignee for the county or district in which the debtor is confined, to take such examination, and it shall be the duty of the official assignee to take down or cause to be taken down such examination fully in writing and transmit the same under his hand forthwith to the judge ; and the official assignee shall be entitled to ten cents for each folio of one hundred words of such examination.

(1.) In pursuance of such order the said confined debtor and any witnesses subpoenaed to attend and give evidence at such examination may be examined on oath at the time and place specified in such order before such judge or assignee ; and if on such examination it appears to the satisfaction of the judge that the said debtor has *bona fide* made an assignment as required by this Act, and has not been guilty of any fraudulent disposal, concealment, or retention of his estate or any part thereof, or of his books and accounts or any material portion thereof, or otherwise in any way contravened the provisions of this Act, such judge shall, by his order in writing, discharge the debtor from confinement or imprisonment ; and on production of the order to the sheriff or gaoler, the debtor shall be forthwith discharged without payment of any gaol fees : Provided always, that no such order shall be made in any case unless it be made to appear to the satisfaction of such judge that at least seven days' notice of the time and place of the said examination had been previously given to the plaintiff in the suit in which the debtor was imprisoned, or to his attorney and to the assignee for the time being :

(2.) The minutes of the examination herein mentioned shall be filed in the office of the clerk of the court out of which the process issues, and a copy thereof shall be delivered to the assignee ; and if, during the examination, or before any order be made, the official assignee or the appointed assignee, or the creditor or any one of the creditors at whose suit or suits the debtor is in custody, makes affidavit that he has reason to believe that the debtor has not made a full disclosure in the matters under examination, the judge may grant a postponement of such examination for a period of not less than seven days nor more than fourteen days, unless the parties consent to an earlier

(3.) After such examination, in case of any subsequent arrest in any civil suit as aforesaid for causes of action arising previous to the assignment or process for liquidation, the said debtor may, pending further proceedings against him under this Act, be forthwith discharged from confinement or imprisonment in such suit, on application to any judge and on producing such previous discharge : Provided that nothing, in this section contained, shall interfere with the imprisonment of the said debtor, in pursuance of any of the provisions of this Act.

When a party becomes insolvent and takes proceedings under the Act, he submits himself to the provisions of the Act, and if he is in custody and wishes to be discharged, he must take the remedy pointed out by the Act, and cannot resort to another tribunal. This section of the Act indicates the method of proceeding in such case, and if there is a conflict between this section and the local Statutes of any Province, the latter are repealed so far as inconsistent with the former ; for the 149th section provides that all Acts and parts of Acts now in force in any of the Provinces which are inconsistent with the Insolvent Act are repealed. Thus it has been held in New Brunswick, that a debtor who assigns under the Insolvent Act, cannot, if in custody, obtain an order for support under the Insolvent Confined Debtors' Act, and can receive his discharge only in the manner pointed out by the Insolvent Act (ex parte *Bejeau*, 2 Pugsley, 200 ; see also *Stevenson v. McOwan*, 11 L. C. J. 46 ; *Hegan v. Jones*, 2 Pugsley, 290).

In an unreported case (*Hill v. Moore*) before Galt, J., in the Court of Common Pleas for Ontario, it was held that the proper remedy for a debtor who was arrested on a *capias* before his assignment in insolvency, was under the Insolvent Act, he having voluntarily submitted to the provisions of the Act by making an assignment (*Edgar & Chrysler's Ins. Act*, 137).

Where an insolvent applied for his discharge from arrest under the 145th section of the Act of 1869, and it was argued that, as the defendant possessed nothing to assign, he having before his assignment, parted with or encumbered all his estate to its full value, it could not be said that he had *bona fide* made an assignment under sub-section 2 of this section corresponding to sub-section 1 of the present Act, but it was not shewn that there was

such a fraudulent parting with or encumbering of the estate of the debtor, as would, taken in connection with the other facts of the case, justify the Court in the conclusion that the insolvent did not, in good faith, make his assignment. The Court held the assignment *bona fide* under this section, and declared that even if one principal object of the insolvent was to obtain his discharge from arrest by means of the insolvency proceedings, this would not be material so long as the object of the Act in so far as the creditors are concerned, was attained by procuring whatever portion of the debtor's estate they might be entitled to for the satisfaction of their debts (*Hood v. Dodds*, 19 Grant, 639).

Although a debtor may fail to show himself entitled to his discharge as an insolvent, it does not follow that he is disentitled to his discharge from arrest, for the conditions of discharge in the one case are not so severe as in the other. The words "or otherwise in any way contravened the provisions of this Act" in subsection one of this section, cannot be read in so wide a sense as to include all the requirements and conditions necessary to be observed in order to procure the general discharge of the insolvent, but must be limited to those provisions required to be performed by the insolvent prior to his application, such as the preparation of statements, attending the meetings of creditors, submitting to examinations and such like. These may be termed the direct requirements or provisions of the Act, as distinguished from those which are mere conditions to be fulfilled if the insolvent desires to procure his certificate. If the debtor submits to an examination, and upon such examination it appears that the debtor has made a *bona fide* assignment as required by the Act, and has not been guilty of any fraudulent disposal, concealment, or retention of his estate, or any part thereof, or of his books and accounts, or any material portion thereof, and has not contravened the provisions of the Act, as above explained, namely, those direct provisions required to be performed up to the time the discharge from arrest is sought, he is entitled to his discharge from arrest (*Hood v. Dodds*, 19 Grant, 639). The insolvent was, therefore, discharged from arrest, although the absence of books, the absence of any satisfactory statement, as to how it came that a credit balance of

\$15,000 a short time before the insolvency, was within a few months turned into a debit balance of nearly \$30,000, the loaning to his brother a sum of \$17,000 to carry on a business in which he failed, and which was being carried on without capital; the receipt of \$1,250 from the plaintiff by the insolvent a few months before his insolvency, and no explanation of what became of it; all went to show that the defendant was not entitled to an order of discharge.

## APPEAL.

128. In the Province of Quebec all decisions by a judge in chambers in matters of insolvency shall be considered as judgments of the Superior Court, and any final order or judgment rendered by such judge or Court may be inscribed for revision or may be appealed from by the parties aggrieved in the same cases and in the same manner as they might inscribe for revision or appeal from a final judgment of the Superior Court in ordinary cases, under the laws in force when such decision shall be rendered. If any of the parties to any contestation, matter or thing upon which a judge has made any final order or judgment are dissatisfied with such order or judgment, they may, in the Province of Ontario, appeal therefrom to the Court of Error and Appeal or to any judge of that Court (39 Vict. chap. 30, s. 16); in the Province of New Brunswick to the Supreme Court of New Brunswick, or to any one of the judges of the said Court; in the Province of Nova Scotia to the Supreme Court of Nova Scotia or to any one of the judges of the said Court; in the Province of British Columbia to the Supreme Court of that Province, or to any judge of the said Court; in the Province of Prince Edward Island to the Supreme Court of Judicature, or to any judge of the said Court; in the Province of Manitoba to the Court of Queen's Bench, or to any judge of the said Court; but any appeal to a single judge in the Provinces of Ontario, New Brunswick, Nova Scotia, British Columbia, Prince Edward Island, or Manitoba, may, in his discretion, be referred, on a special case to be settled, to the full Court, and on such terms in the meantime as he may think necessary and just. No such appeal or proceeding in revision shall be entertained unless the appellant or party inscribing for revision shall have within eight days, from the rendering of such final order or judgment, adopted proceedings on the said appeal or revision, and shall within the said delay have made a deposit or given sufficient sureties before a judge that he will duly prosecute the said appeal or proceedings in revision, and pay such damages and costs as may be awarded to the respondent. If the party appellant does not proceed with his appeal, or in review, as the case may be, according to the law or the rules of practice, the Court, on application of the respondent, may order the record to be returned to the officer entitled to the

custody thereof, and condemn the appellant to pay the respondent the costs by him incurred. The judgment of the Court to which under this section the appeal can be had shall be final (40 Vict. s. 27).

The 39 Vict. chap. 31, s. 12, enacted that the appeal provided for by this section of the Act should extend to all orders, judgments, or decisions of the judge.

The 39 Vict. chap. 30, s. 16, provides that the appeal shall be to the Court of Appeal in Ontario, instead of to either of the Superior Courts of Common Law or the Court of Chancery.

The 40 Vict. s. 27, amended this section by striking out the words "or unless he" in the thirty-fifth line, and inserting in lieu thereof the word "and," and by providing also that the judgment of the Court appealed to, should be final.

In *re Lamb* (4 U. C. P. R. 16), the Court enunciated the principle, that on an appeal it is not considered wise to interfere with the discretion of a judge in granting or suspending a discharge, the judge having heard the examination of the insolvent, and been cognizant of the various proceedings in the case. Clear evidence is required to induce a Court of Appeal to set aside the Judge's decision (see also *Davidson v. Ross*, 24 Grant, 50).

An appeal may be made from the order and decision of the judge, on an application by the insolvent, for his discharge from arrest under the 127th section of the Act (*Hood v. Dodds*, 19 Grant, 639).

A demand was made upon a debtor under section 14 of the Insolvent Act of 1869, requiring him to make an assignment of his estate and effects, for the benefit of creditors. The demand was made in the County of St. John, the debtor being a resident of Westmoreland. The debtor presented a petition under section 15, to the county court judge, upon hearing which he decided that the demand was inoperative, and ordered that no further proceedings be taken, on the ground that the demand should be made in the county where the debtor resided, or in which his chief place of business was. It was held, that under the 83rd section of the Act, an appeal would lie from the judge's decision, and a *certiorari* to remove the order was therefore refused (*ex parte Thomas*, 2



Hannay, 163). A final judgment rendered by a judge, dismissing a writ of attachment, under section 3 sub-section 6 of the Act of 1864, was held subject to review, under 27 and 28 Vict. chap. 39, s. 30 (*Johnston v. Kelly*, 1 L. C. L. J. 64).

An insolvent had been refused an absolute discharge by a county judge, from whose decision he appealed. When the application was refused the judge gave his judgment in writing saying: "I have come to the conclusion, after having heard the insolvent and his objecting creditors, to refuse the discharge of the insolvent absolutely," and at the end of this document, after setting out his reasons in full, he says: "I cannot consent to grant the insolvent his absolute discharge, but must refuse his discharge absolutely, and must deny the prayer of his petition above mentioned." This was held an order which could be appealed from, although no formal order was drawn up or signed (re *Jones*, 4 U. C. P. R. 317).

It has been held, in the Province of New Brunswick, that, when there is an appeal from the award of the assignee to the county judge, and the latter makes an order, on the hearing of the appeal, such order is a final order or judgment within the meaning of this section, and an appeal will lie therefrom to the Supreme Court (*Skinner v. McLeod*, 2 Pugsley, 131).

Such a case as the above cannot now arise under the 95th section of the Act, as the judge has original jurisdiction thereunder.

A party appealing from the decision of a judge of the county court, under section 83 of the Insolvent Act of 1869, is bound to prove the service of the notice of appeal, and that all other preliminary steps have been duly taken (*Hamilton v. Burgeois*, 3 Pugsley, 232).

The sureties under this section cannot be the solicitors for the appellants, the rule in the other Courts is to be followed (re *Owens*, 12 Grant, 564; and see *Panton v. Labertouche*, 1 Ph. 265; *Meyers v. Hutchinson*, 2 U. C. P. R. 380). The proper time to take objection to the insufficiency of the sureties is before the judge of the Insolvent Court, by analogy to proceedings in ap-

peals from the county to the superior courts (Con. Stats. U. C. chap. 15, s. 67, and re *Owens*, ubi supra).

In re *Wuddell* (2 U. C. L. J. N. S. 242) the security in appeal from the county judge was given before the county judge.

In *Hodd v. Dodds* (19 Grant, 639) no objection was taken to the form of the bond, but it was objected that it was not actually executed in the presence of or "before" the judge, the bond having been executed at the Town of Guelph, and transmitted to and received by the judge in the Town of Berlin, where he resided. The Court did not decide the point, considering on the authority of re *Owens* (12 Grant, 564) that the objection should have been taken before the judge of the Insolvent Court.

It is not necessary that the petition in appeal should be signed by the party or his attorney. The service of notices of setting down for argument of the appeal is sufficient notice. The petition should be addressed to the Court, and not to the chief justice only. The neglect of the assignee to file the papers on or before the day of presenting the petition is no reason for rejecting the appeal, though it may be a reason for enlarging the hearing and proceeding against the assignee for his neglect or contempt. Points not taken in the Court below are not open to parties before the appellate Court. The proper mode of raising technical objections to the proceedings in cases of this kind is to move a rule to set the proceedings aside instead of urging the objections on the argument of the merits (re *Parr*, 17 C. P. U. C. 621).

It was held under sections 83 and 84 of the Act of 1869, that it was not sufficient for the appellant to serve notice of appeal within the five days limited by the Act, and subsequently file the appeal bond, but that the application in appeal should be served upon the respondent and security for costs also given within five days from the day in which the order or judgment is rendered, otherwise the appeal will not be allowed (re *Thomas*, 6 P. R. U. C. 252).

The 84th section of the Act of 1869 expressly required the security to be given within the five days, and the amendment introduced by the 40 Vict. s. 28, requires that the security should

be given, as well as the proceedings adopted within the eight days; and the case of *re Thomas supra* will apply to the present Act as amended by the 40 Vict. s. 28. In computing the eight days under this section, the day on which the order or judgment is made must be excluded. If, for instance, the order or judgment was made on the 14th, the eighth or last day would be the 22nd. If the last day falls on a Sunday or non-judicial day, the appellant would have the whole of the following day within which to proceed according to the general rule or practice in such cases (see ante p. 69-70; *Hood v. Dodds*, 19 Grant, 639).

Under the Act of 1864, the appeal had to be first allowed by the judge, and notice had to be given of the application for allowance, and the application had to be made within eight days, from the day on which the judgment of the judge was rendered. In one case the order of the judge was made on the 2nd of June, and notice of the application for the allowance of the appeal was served on the 7th, returnable on the 9th of June. The creditors resided in Montreal, and the insolvent in Guelph, and it was objected, that as Guelph is more than 15 miles from Toronto, where the proceedings were to be taken, the notice allowing only one clear day between the service and return was insufficient, (see section 108 of this Act). The Court held, that when the service of the notice was within the eight days the application might be for a day subsequent, and they allowed the notice to be amended so as to give the time required. It was also objected, that the notice was not entitled in any court and did not mention on what evidence the motion was to be made. The Court considered the notice irregular in these respects, but allowed it to be amended. It was also held, that the notice need not set forth the ground of appeal (*re Owens*, 12 Grant, 446; 3 U. C. L. J. N. S. 22).

The above case would apply to the present Act. The application in appeal and notice should be served within eight days, but the notice might be for an application to the Court on some day after the expiration of eight days.

It is clear from the reading of this section that the appellant must have been a party to the contestation, &c., from which the

appeal is brought; and he must also have proved his claim (see also *re Sharpe* 2 Ch. Cham. 67).

Where the affidavits on which the allowance of an appeal under the Act of 1864 was sought, were not entitled in any Court, they were not allowed to be read. It was held also that it should be distinctly shown that an order had been made, and the terms of the order should also be shown (*ib*).

If an appeal is made to one of the judges of the Superior Court from an order of the judge in insolvency and the former makes an order referring the matter to the full Court, but no special case is settled between the parties as required by this section, the want of the special case is an irregularity which may be waived and if no objection is made on this ground until the argument of the case before the full Court, the objection will be waived. The proper mode of raising the objection is as already explained by a rule to set aside the proceedings (*re Sharpe*, 20 C. P. U. C. 82; following *re Parr*, 17 C. P. U. C. 621). In this case the petition of appeal was filed by leave of the Court, and the appellant was authorized to serve a notice of hearing for a day named.

The 84th section of the Act of 1869 required that the application in appeal should set forth the proceedings before the judge. But it was held that the application need not set out all the evidence, documents and materials upon which the judge had made the order or judgment appealed from. The object of the Legislature in this section was to require a reasonable notice of the matter appealed from, the grounds upon which the appeal was based, and the materials which supported it; and this object would be satisfied if either the petition or the notice accompanying it showed to the opposite party the objection which was taken to the proceeding appealed from and the materials to be used on the argument of the appeal. Where a petition had been presented and served with a notice of the application and a copy of the judge's decision, and the notice referred to the proceedings before the judge on which the appellant relied for the reversal of the order, and stated that these would be read on the application, this was held sufficient (*Hood v. Dodds*, 19 Grant, 639).

When an insolvent who has appealed from the decision of a

county judge refusing to set aside an attachment against him, dies during the pendency of the appeal and no personal representative has been appointed, the appeal fails (*Laurie v. McMahon*, 6 P. R. U. C. 9).

It would seem that fresh documents, the genuineness of which cannot be disputed, may be allowed to be proved and received (re *Wiltshire Iron Co.*, L. R. 3 Ch. App. 443; 18 L. T. N. S. 423). But as a general rule, leave ought not to be given to use evidence on the appeal which was not used on the hearing before the Court below, through the fault of the party desiring to use it on the appeal (ex parte *Isaac*, L. R. 6 Ch. App. 58). A shorthand writer's note of the evidence given at the hearing of the Court below, cannot be admitted, except by consent. But if the judge's notes are produced, and purport to contain a full record of what took place, they will be admitted (ex parte *Gillebrand*, 23 W. R. 194; ex parte *Hicks*, 23 W. R. 852).

Under the Act of 1864, the costs of appeal were in the discretion of the judge of the Court appealed to (see re *Lamb*, 4 U. C. P. R. 16). The present Act is silent on this point, though it provides for costs in the event of the appellant not duly prosecuting his appeal.

129. Pending the contestation of any claim or of a dividend sheet, and of any appeal or proceeding in revision, the assignee shall reserve a dividend equal to the amount of the dividends claimed or contested.

#### FRAUDS AND FRAUDULENT PREFERENCES.

130. All gratuitous contracts or conveyances or contracts without consideration, or with a merely nominal consideration, respecting either real or personal estate, made by a debtor afterwards becoming an insolvent, with or to any person whomsoever, whether such person be his creditor or not, within three months next preceding the date of a demand of an assignment, or for the issue of a writ of attachment under this Act whenever such demand shall have been followed by an assignment, or by the issue of such writ of attachment, or at any time afterwards, and all contracts by which creditors are injured, obstructed, or delayed, made by a debtor unable to meet his engagements, and afterwards becoming an insolvent, with a person knowing such inability or having probable cause for believing such inability to exist, or after such inability is public and notorious, whether such person be his creditor or not, are presumed to be made with intent to defraud his creditors.

The time mentioned in this section, and also in sections 131 and 133, is next before the demand of assignment, instead of the execution of the deed of assignment, as in former Acts.

In *Newton v. Ontario Bank* (13 Grant, 652) the Court was of opinion that the sections of the Act of 1864, corresponding to sections 130, 131, and 132 of this Act, did not apply to the insolvent's transactions with his creditors, but only those with strangers. But these sections are now framed to meet all persons whether creditors or not.

This section embraces two classes of contracts. First, those made without consideration within three months prior to the proceedings in insolvency; and, second, contracts by which creditors are injured or delayed by a debtor in insolvent circumstances, and who afterwards becomes insolvent, with a person who knows or has probable cause for believing the insolvent condition of the debtor, though there may have been a consideration for the contract (*Skinner v. McLeod*, 2 Pugsley, 134, per Ritchie, C. J.).

In *Newton v. Ontario Bank* (13 Grant, 652), it was said that the second branch of this section and the 132nd section of the Act might be read together and that the latter section was in substance a re-enactment of the Statute, 13 Elizabeth, chap. 5. (See also *Davidson v. Ross*, 24 Grant, 76, per Patterson, J.).

The latter part of this section must apply to acts whereby the general body of creditors are injured. Two mortgages were created by a debtor in favour of a creditor, whose claim consisted of promissory notes then current. It appeared that the debtor was in insolvent circumstances, and the Court considered that both the debtor and creditor contemplated the debtor going into insolvency, which he did shortly afterwards. It was held that the transaction might be set aside (*Payne v. Hendry*, 20 Grant, 142).

A person in insolvent circumstances made a bill of sale of his property to one of his creditors, the consideration therefor being a pre-existing debt, and a sum of money in addition, sufficient to make up the price agreed upon, as the value of the property sold, the amount of money so received by the debtor being by him

paid over, with the knowledge of the purchaser, to another creditor, and three months after the sale was completed the debtor made an assignment of his assets under the Insolvent Debtors' Act. On a bill filed by a creditor for that purpose the sale was set aside, and a re-sale of the property ordered, the proceeds to be applied in payment of the plaintiff's claim, and the residue, if any, to be paid over to the assignee in insolvency. The bill of sale thus made, not with the object of carrying out a sale, but of securing a past debt, the sale, being only part of the plan, was considered void *in toto*, as being in contravention of the Statute (*Coates v. Joslin*, 12 Grant, 524).

The plaintiff who lived in Stirling, and carried on business there, went to Belleville, about twenty miles distant, where he saw for the first time, about midday, one G., who was in business there. They discussed the purchase by the plaintiff of G's. stock in trade, amounting to something over \$4,000, but concluded no bargain. The plaintiff then went home, realized all his available assets, part at a sacrifice, returned to Belleville between nine and ten the same night with his son, at once commenced taking stock with G., finishing next evening between five and six, and then, without making any enquiry as to G's. position, or taking any advice on the subject, according to his own statement, purchased the stock at ninety cents on the dollar, and paid over to G. in cash the purchase money, \$4,279. G., who was insolvent at the time, being indebted about \$17,000, with less than \$5,000 of assets, absconded that night with the money. Other evidence went to shew that plaintiff in fact purchased the business at thirty-five per cent. discount, *i. e.* for \$2,700; and there were other circumstances of suspicion, it was held that the jury properly found the sale to be fraudulent and void under sections 86 and 88 of the Act of 1869. It was also held that even if the plaintiff were innocent of a wrongful intent, the sale of his whole stock in trade was in itself an act of bankruptcy (*Brooks v. Taylor*, 26 C. P. U. C. 443).

A partnership existing between two persons was, within three months of the issue of a writ of attachment in insolvency, dissolved, and one of the parties transferred his interest in the part-

nership property to the other, but at the time of such transfer the firm, as well as the partners individually, was insolvent, and each knew, or had probable cause for believing the inability of the other to meet his engagements. Afterwards the retiring partner and the firm were placed in insolvency by compulsory liquidation and a different assignee appointed for each. It was held that, the transfer was fraudulent and void, and that nothing passed under it, and that the assignee of the firm therefore, and not of the separate partner was entitled to the effects of the partnership including the property transferred by the retiring partner. An order made by the county judge for the transfer of such property from the separate to the joint assignee, was therefore confirmed. It was also held that even if the partnership creditors could prove against the effects in the hands of the separate assignee, so that all that was required was a direction to that effect as the making of the order was purely a matter of discretion, the Court would not interfere (re *Cuton and Cole*, 26 C. P. U. C. 308).

Under this section the presumption that the contract or conveyance is made with intent to defraud creditors cannot be rebutted. The section should be read as if it concluded that all such contracts "are to be deemed to be made with intent to defraud creditors," and are consequently void (*Campbell v. Barrie*, 31 Q. B. U. C. 289-90; see also *Davidson v. Ross*, 24 Grant, 22, 44, 75, 76 and 77).

The phrase "probable cause for believing" &c., the inability of the debtor to meet his engagements occurs in this and in the 134th section of the Act. The Act in force in the United States uses the word "reasonable" instead of "probable" as in our Act. This phrase in our Act does not import any actual knowledge on the part of the creditor, nor does it seem necessary that he should have any actual belief on the subject; and belief will not protect a party, if he has probable cause to disbelieve (*Davidson v. McInnes*, 24 Grant, 414). It only requires that he should have probable cause to believe, and he must be considered to have probable cause to believe when such a state of facts is brought to his notice in respect to the affairs and pecuniary condition of the debtor as would lead prudent business men to the



conclusion that the debtor cannot meet his obligations as they mature in the ordinary course of business (*Toof v. Martin*, 6 B. R. 49; re *Clark*, 10 B. R. 21). If it appears that the debtor was actually insolvent, and that the means of knowledge upon the subject were at hand, and that such facts and circumstances were known to the creditor as clearly put him on enquiry, he had probable cause to believe that the debtor was insolvent. Ordinary prudence is required of a purchaser in respect to the title of the seller, and if he fails to investigate, when put upon enquiry, he is chargeable with all the knowledge which it is reasonable to suppose he could have acquired if he had performed his duty (*Scammon v. Cole*, 5 B. R. 257; *Buchanan v. Smith*, 7 B. R. 513). Knowledge of a trader's inability to pay his debts in the ordinary course of business derived from his failure to pay the debt due to the preferred creditor himself, is at least sufficient to put a party on enquiry as to the debtor's insolvency (re *Forsyth*, 7 B. R. 174). Willing ignorance as where a party wilfully shuts his eyes to the means of information which he knows are at hand is regarded as equivalent to actual knowledge (*Scammon v. Cole* 5 B. R. 257; *Wager v. Hall* 5 B. R. 181).

If other creditors institute enquiries shortly after the making of the transfer, and find no difficulty in learning that the debtor owes more than the value of his property, this shows that the means of ascertaining his condition were at hand (*Wager v. Hall*, 5 B. R. 181).

The existence of a financial crisis constitutes of itself a reasonable cause for believing doubtful men to be insolvent (re *Clark*, 10 B. R. 21). A conveyance out of the ordinary course of business is sufficient evidence, if uncontrolled, to establish a knowledge of the debtor's insolvency. The purchaser is put upon the enquiry and should take steps to ascertain the condition of the debtor, or at least his general reputation as to solvency (*Tuttle v. Truax*, 1 B. R. 601; *North v. House*, 6 B. R. 365).

131. A contract or conveyance for consideration, respecting either real or personal estate, by which creditors are injured or obstructed, made by a debtor unable to meet his engagements with a person ignorant of such inability, whether such person be his creditor or not, and before such inability has

become public and notorious, but within thirty days next before a demand of an assignment or the issue of a writ of attachment under this Act, or at any time afterwards, whenever such demand shall have been followed by an assignment, or by the issue of such writ of attachment, is voidable, and may be set aside by any court of competent jurisdiction, upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the Court may order.

A wife having an inchoate right of dower out of an equity of redemption in property worth \$1,300, agreed with her husband, and one of his creditors that she should release this dower in consideration of an absolute conveyance of property worth \$1,700. The husband was at this time in insolvent circumstances having made an assignment some time previously. It was held, that the release of dower under these circumstances was a fraud upon the other creditors and the Court set aside the transaction with costs (*Black v. Fountain*, 23 Grant, 174; see also *Masson v. McGowan*, 2 L. C. L. J. 37, as to fraudulent transfers).

A sale of property by the insolvent, where the purchaser pays full value for the goods he buys, is not necessarily a fraudulent transaction, so as to be voidable under this section, though the sale takes place immediately before the assignment. If the creditors cannot get the identical property sold, they get its value, and are consequently not injured or obstructed. Thus, where on the 21st September, 1866, one S. transferred certain cheese to K., by delivering him warehouse receipts therefor. S. became insolvent on the 19th of October, and on the following day K. became aware of it. On the 22nd of October, K. executed a mortgage to the Bank of Montreal on this cheese. It was held that the subsequent insolvency of S. did not affect K's right respecting this property. Even if a case comes within this section, the contract is voidable, only under the order of a competent tribunal, and this order will only be made on such protective terms to the person from actual loss or liability, as the Court may see fit to direct (*Bank of Montreal v. McWhirter*, 17 C. P. U. C. 506).

In holding void a mortgage, under section 3 (j) of the Act, both as to an antecedent debt and a fresh advance, on the ground that the fresh advance was not made *bona fide*, to enable the

debtor to carry on his business, *Moss, J. A.*, expressed an opinion, that this section did not apply, when the creditor knew that the debtor was wholly unable to meet his engagements, and he refused to uphold the mortgage even as to the fresh advance (*Kalus v. Hergert*, 1 Appeal Reports, Ont., 75).

It was stated by the Court, in *Mathers v. Lynch* (27 Q. B. U. C. 244), that the transaction there in question might possibly come within this section. The action was detinue and trover for the conversion of goods, but the Court said they had no power to settle any terms for the protection of the plaintiff, but that this must be left to another tribunal.

The question was raised in *Skinner v. McLeod* (2 Pugsley, 134), whether the Court of "competent jurisdiction," referred to in this section, would not mean a Court of Equity only.

132. All contracts, or conveyances made, and acts done by a debtor, respecting either real or personal estate, with intent fraudulently to impede, obstruct or delay his creditors in their remedies against him, or with intent to defraud his creditors, or any of them, and so made, done and intended with the knowledge of the person contracting or acting with the debtor, whether such person be his creditor or not, and which have the effect of impeding, obstructing, or delaying the creditors of their remedies, or of injuring them or any of them, are prohibited, and are null and void, notwithstanding that such contracts, conveyances, or acts be in consideration, or in contemplation of marriage.

A contract, which falls within this section, is absolutely null and void, *ab initio*, and where a promissory note is obtained in violation of this section, it will be void, even in the hands of a third person, who takes it without any positive knowledge of its origin, and the holder of such a note will not be allowed to rank on the estate in respect of it (re *Davis*, 13 L. C. J. 184; 5 U. C. L. J. N. S. 297; see as to the meaning of the words "null and void" *Pearce v. Morrice*, 2 A. & E. 94; *McCord v. Harper*, 26 C. P. U. C. 96).

The "knowledge" referred to in this section would seem to be actual knowledge, and not mere constructive notice (*Leys v. McPherson*, 17 C. P. U. C. 266).

A person in insolvent circumstances conveyed, by way of settlement to his intended wife, a lot of land, upon which the

settlor had commenced to put up a house, but which was not completed until after marriage. On a bill filed by the assignees in insolvency, the Court declared that for so much of the building as was completed after marriage, the creditors had a claim on the property, but gave the wife the right to elect whether she would be paid the value of her interest without the expenditure after marriage, or pay to the assignees the amount of such expenditure; and it subsequently appearing that her husband had created a mortgage prior to the settlement, the wife was declared entitled to have the value of the improvements made after marriage, applied in discharge of the mortgage in priority to the claims of the creditors (*Jackson v. Bowman*, 14 Grant, 156).

A covenant, in an ante-nuptial settlement by the husband to settle upon such trusts as the trustees should require, all the real and personal estate of, or to which he should become possessed or entitled during the coverture, is void, as against his trustee in bankruptcy, as being against public policy, and an attempt to withdraw the whole of his property from the just claims of his creditors (ex parte *Bolland*, L. R. 17 Eq. 115; 29 L. T. N. S. 543).

133. If any sale, deposit, pledge or transfer be made of any property real or personal by any person in contemplation of insolvency, by way of security for payment to any creditor; or if any property real or personal, movable or immovable, goods, effects, or valuable security, be given by way of payment by such person, to any creditor whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer or payment shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the Assignee, in any court of competent jurisdiction; and if the same be made within thirty days next before a demand of an assignment, or for the issue of a writ of attachment under this Act, or at any time afterwards, whenever such demand shall have been followed by an assignment or by the issue of such writ of attachment, it shall be presumed *prima facie* to have been so made in contemplation of insolvency.

The 40 Vict. s. 29 amended this section by adding after the word "presumed" in the last line but one, the words "*prima facie*." This amendment makes the presumption rebuttable, and was no doubt introduced in consequence of the opinions of two of the Judges in *Davidson v. Ross*, 24 Grant, 22 (see post p. 32).

This section now extends to real estate as well as to personalty, though in *Newton v. Ontario Bank* (13 Grant, 652), the majority of the Court were of opinion that the Act of 1864 only, applied to personalty. This section does not invalidate conveyances executed before the Act passed, and which were valid at the time of their execution (*Gordon v. Young*, 12 Grant, 318).

The first branch of this section relates to transfers, etc., by way of *security* for payment, etc., the second branch of the section relates to transactions by way of *payment*. "Such person" in the second branch of the section is an equivalent to "any person in contemplation of insolvency" and the latter words should be implied in the second branch of the section (see observations of Wilson, J. in *Campbell v. Barrie*, 31 Q. B. U. C. 285). Presumed to be made in contemplation of insolvency signifies, presumed to give an unjust preference or to defeat equal distribution among the creditors (ib.; see also *Davidson v. Ross*, 24 Grant, 75-6; per Patterson, J. A.), the prevention of ratable distribution which the insolvent law aims to secure being an unjust preference.

The point as to who is a creditor of the insolvent came up in a very important case in Nova Scotia. In that case the defendants were accommodation indorsers for the firm of W. L. Dodge & Co., who on the 29th of Nov., 1870, assigned in insolvency to the plaintiff. On the 26th of July previous, defendants had endorsed a note made by W. L. Dodge & Co. to T. G. Budd, one of the firm of W. L. Dodge & Co., for \$3,000, payable three months after date. On the 26th of October, W. L. Dodge & Co. sold to David McPherson a quantity of lumber for which was given two notes for \$1,333.75, one for \$1,167.50 and another for \$1,500. These notes were transferred by W. L. Dodge & Co. to the defendant who had endorsed the \$3,000 note which would mature on the 29th of October. The transfer was before the \$3000 note fell due and these McPherson notes were discounted by defendant and the \$3,000 note taken up therewith and the balance credited to W. L. Dodge & Co., the balance of \$835, which went in reduction of a further liability, on a note for \$3,500, of the insolvent; and defendants gave a renewal for the balance. The defendants were indorsers after Budd, and were consequently sureties to the hold-

ers of the note, that it should be paid by the prior parties when it became due, but neither W. L. Dodge & Co., nor Budd the first endorser was in any way liable to the defendants, nor could they be liable until the note fell due and the defendants were compelled to pay it. The transfer of the McPherson notes was made before the note endorsed by the defendants fell due, and consequently before there was any liability whatever on the defendants. It was contended that under these circumstances the defendants not having actually paid or become liable to pay the note at the time of the transfer were not creditors of the insolvents within the meaning of the 89th section of the Act of 1869. Young, C. J., and Ritchie, J., held that the defendants were creditors of the insolvents, and as the insolvents were at the time of the transfer hopelessly insolvent and there was no probability of there being able to tide over their difficulties the transfer was held to be void under this section.

McCully, J., and Wilkins, J., dissented from the judgment given by the other two judges, and held that the last indorser was not before the maturity of the note a creditor of the insolvent (*Harvey v. Wilde*, Sup. Ct. N. S. 1874).

In one case in this Province the question was raised whether an indorser of the note of the insolvent was, before the maturity of the note a creditor of the insolvent, and the Court held that he was (*Churcher v. Cousins*, 28 Q. B. U. C. 540).

In *Roe v. Smith* (15 Grant, 344), A. was indorser of a note, which had not matured. The maker of the note was insolvent to the knowledge of A. Vankoughnet, Ch. expressed an opinion that A. was not a creditor until he paid the note. The better opinion, however, seems to be that the indorser is a creditor in such a case as the above (see section 2, *h*, sections 9 and 80, and notes thereon; see also *Botham v. Armstrong*, 24 Grant, 216; *Churcher v. Stanley*, *ib.* (n)).

Since the decision in *Davidson v. Ross* (24 Grant 22) in the Court of Appeal for Ontario, pressure has ceased to be material in determining whether a transaction is void under this section. Two things only need concur to avoid the transaction, namely, contemplation of insolvency, and the fact that the creditor thereby obtains or will obtain an unjust preference over the other

creditors, and unjust preference is not synonymous with fraudulent preference. Under this section the intent of the debtor as fraudulent or otherwise, is not an ingredient; the preference, as a fact, is made material, but not the intent to prefer; as, therefore, pressure has been held to displace the intent to prefer by showing that the transaction was not the voluntary act of the debtor, and as the intent to prefer is not material, under this section, so long as there exists the other ingredients referred to, namely, contemplation of insolvency, and an actual, unjust preference; the fact that there is pressure will not prevent a transaction from being void under this section; but preference may still be unjust within the Statute if made in contemplation of insolvency. In the case referred to, two cousins, H. and R., entered into partnership in trade, R. furnishing all the capital (about \$1400). After eighteen months R. retired from the business, assigning as a reason therefor, his having become possessed of the family homestead, the management of which it was necessary for him to superintend. On R.'s retirement, he sold his interest to S., a brother of H., for about \$1230, paid partly by two promissory notes, one for \$80, at a short date, and the other for \$1080, at a year, indorsed by two other brothers, and the residue by \$70 in cash, supplied by one of the indorsers—S. having been without any means of his own. S. shortly afterwards (about three or four months) withdrew from the business, making way for J., a brother-in-law of H. and S., who put a \$1000 into the business, but paid nothing to S. for the transfer of his interest. The smaller note was duly paid, but the larger note was not met at maturity, and it was alleged that there was an understanding for an extension of the time for payment. R. omitted to give the indorsers' notice of dishonour, and some months afterwards claiming that the partnership effects were, under the circumstances, and a prior, verbal agreement, answerable for the note applied to H. and J. (the new firm) for payment thereof, which, being unable to meet, they assigned to R. certain accounts, and executed in his favour a chattel mortgage on nearly the whole of their assets, as security for its ultimate payment. Within thirty days after the execution of these instruments H. and J. were placed in insol-

veny by other creditors. Draper, C. J., held that defendant was not a creditor, but did not rest his decision on that ground. Patterson, J., held that defendant was a creditor, but does not express an opinion as to whether, as a matter of fact, there was pressure; and Burton, J., held that pressure was not proved, but the Court was unanimous in the opinion that pressure could not validate a transaction under this section, if there was a contemplation of insolvency, and an actual unjust preference, and the assignment and mortgage were held void as an unjust preference made in contemplation of insolvency. Draper, C. J., and Patterson, J., held that the presumption under this section is not rebuttable, and, therefore, that any act done or security given by a debtor within the thirty days mentioned in this section, whereby one creditor obtains an unjust preference over the other creditors is void (see, however, 40 Vict. chap. 41, s. 29).

Patterson and Burton, J. J., declared that, in the Province of Quebec, the doctrine of pressure had never been recognised as in Ontario, and, in view of this fact, Patterson, J., expressed an opinion that the rule that when an Act of Parliament has received a construction either from long practice or by judicial interpretation, and is afterwards re-enacted in the same terms, the Legislature is deemed to have had that construction in view in the re-enactment, cannot apply to an Act of the Dominion where different constructions are shown to have obtained in some of the Provinces of the Dominion.

On the doctrine of pressure this case expressly overrules *Campbell v. Barrie* (31 Q. B. U. C. 279); *Archibald v. Haldan* (31 Q. B. U. C. 295); *McFarlane v. McDonald* (21 Grant, 319); *Keays v. Brown* (22 Grant, 10). The cases overruled were all decided on the 89th section of the Act of 1869, corresponding to this section of the present Act.

The writer entirely agrees in the correctness of the decision in *Davidson v. Ross*, as applied to the 133rd section of the Act, and it is to be observed that the Court guarded against expressing an opinion that the same rule would apply to the other sections of the Act in which the element of fraud is contained. The decisions prior to *Davidson v. Ross* treated "unjust preference"



as equivalent to "fraudulent preference," and to constitute a fraudulent preference the transfer or payment must not only be voluntary, but made in contemplation of insolvency (*Campbell v. Barrie*, 31 Q. B. U. C. 279; *Hersee v. White*, 29 Q. B. U. C. 232; *Keays v. Brown*, 22 Grant, 10).

The propositions of the Court in *Davidson v. Ross*, *supra*, were that the preference was unjust within this section if it prevented that equal distribution of the insolvent's estate which the Act was designed to secure, and it was made in contemplation of insolvency, if, at the time it was made, the debtor had in view proceedings under the Act. A number of cases are given under this section, which are merely explanatory of the subject of fraudulent preference, and do not strictly relate to this section as now construed.

Prior to the decision in *Davidson v. Ross*, the Courts had in two cases declared that it was not necessary that the payment or transfer should be made with a fraudulent intent, that the transaction would be void if entered into by the insolvent in contemplation of insolvency, and the effect was to give the creditor, to whom the payment or transfer was made, an unjust preference over the other creditors of the insolvent (see *Adams v. McCall*, 25 Q. B. U. C. 219).

In *Payne v. Hendry* (20 Grant, 148), the decision was rested on section 130 of the Act, but the opinion of the Court was that fraudulent preference was not necessary under section 133. But as the debtor was insolvent to the knowledge of the creditor, and his becoming insolvent was contemplated by both parties, it cannot be regarded as a decision under section 133.

In *Adams v. McCall* (25 Q. B. U. C. 219), the Court held that knowledge on the part of the creditor of the debtor's inability to pay his debts, or of a fraudulent intention on his part to impede, obstruct, or delay his creditors, was not necessary to make the transaction null and void. The material consideration is whether the debtor, in contemplation of insolvency, made transfer whereby the creditor obtained an unjust preference over the other creditors. The policy of the Act is the distribution of the insolvent's effects ratably among all his creditors and if on

of them obtains payment in full by the means stated in this section, it is an unjust preference. Where the transaction is not within the thirty days, the only consequence is that the person seeking to impeach it must give evidence that it was in contemplation of insolvency. One S., on the 25th of November, 1864, agreed to deliver certain timber to the plaintiff, at T., in the State of New York, in May, June, and July, 1865, \$1,500 payable down, and the same sum on the 15th of January, 1st March, and 1st April, 1865, and the balance on delivery and inspection at T. On the 14th of December following he assigned the timber to L., as security for certain advances in goods, which L. agreed to make, to enable him to get it out, and on the 27th of February, 1865, formally delivered it to L.'s son, who, after consulting with S., wrote to the plaintiff that S. desired to deliver the timber to the plaintiff, but was in difficulty, that some of his creditors refused to wait until he could complete his contract, and had commenced actions, and recommending that the plaintiff should anticipate their action by taking a delivery before they could interfere. On the 11th of March the plaintiff accordingly paid L.'s claim, and took a delivery of the timber in Canada instead of in the State of New York. On the 3rd of March, L. had served a writ on S., telling him it was to secure precedence, and an execution was obtained in this suit, under which the sheriff seized, and the seizure was not abandoned until the 1st of July. On the 14th of April S. made an assignment, under the Insolvent Act of 1864, to the defendants. S. admitted that he was insolvent on the 11th of March, and long previous, though he said he did not then know it, and had not informed the plaintiff of it. It was held that this evidence showed a transaction void under this section, and the jury, having found for the plaintiff, a new trial was granted (*Adams v. McCall*, 25 Q. B. U. C. 219).

In the Province of Quebec, also prior to the foregoing decision, it had been declared that it is immaterial that the payment is made by the debtor under compulsion of legal process, and under this section, a sum of money paid by the debtor to obtain his discharge under a *capias ad respondendum*, may be recovered back by the assignee of the debtor, under deed of assignment made im-

mediately after the arrest, the money being paid within thirty days before the execution of the assignment (*Sauvageau v. Lari-vière*, 13 L. C. J. 210).

It is evident, that where fraud is necessary to impeach the transaction, pressure is still material, and where fraud is the only vitiating element in the transaction, pressure may render it valid. But pressure will not validate a transaction where there is another element rendering it void. Thus, a mortgage on the trader's whole property for an antecedent debt will be void, though there is pressure (re *Hurst*, 6 P. R. U. C. 329), and pressure will not protect transactions which obstruct and delay creditors under the 130th section of the Act (*Davidson v. McInnes*, 24 Grant, 414; see also *McWhirter v. Royal Can. Bank*, 17 Grant, 480).

So an assignment of part of a trader's property, to a special class of creditors, on the eve of bankruptcy, and under such circumstances, that it is in direct and express contravention of the bankrupt laws, cannot be made good by any amount of pressure (ex parte *Saffery*, L. R. 4 Ch. D. 555).

But pressure rebuts the fraudulent intent, and if a fraudulent intent is all that is required to make a fraudulent preference, there can be no fraudulent preference where there is pressure (see *Davidson v. Ross*, 24 Grant, 22; *Bills v. Smith*, 11 Jur. N. S. 157; 34 L. J. Q. B. 68).

Thus in *Clemmow v. Converse* (16 Grant 547), the Court declared that *prima facie* a payment by one in so hopeless a state of insolvency, that his payment was to be looked upon as made in contemplation thereof, or a delivery of goods, or other effects by a debtor in that position, is a fraudulent preference. But if the payment is made under the influence of pressure, the presumption of fraud will be rebutted, and a preference which a debtor is induced to give, by threats of criminal or other proceedings, is not void as a fraudulent preference. But to rebut the presumption of fraud, the pressure must be real, and not a feigned contrivance between the debtor and creditor, to wear the appearance of pressure, while the real desire and intention is to give a preference (*Clemmow v. Converse*, 16 Grant, 547).

The object of the law against fraudulent preferences, is to prevent a trader, on the eve of insolvency, from making a voluntary

distribution of his property among his creditors, so as to defeat that equal distribution which is contemplated by the insolvent laws (re *Hurst*, 6 P. R. U. C. 330; per Harrison, C. J.).

In *Davidson v. Ross* (24 Grant, 22) a clear distinction was drawn between "unjust preference" and "fraudulent preference." It was declared that a preference might be unjust without being fraudulent, and in fact this was the gist of the decision. The 133rd section of the Act was distinguished from the 130th and 132nd which latter sections show that the intent is material in the use of the word fraudulent—a fraudulent preference may no doubt be also unjust, but preference may be unjust without being fraudulent—pressure, however, does not negative the contemplation of insolvency under this section.

As we have seen to constitute a fraudulent preference, the transfer or payment must be voluntary and must also be in contemplation of insolvency. The intent to prefer is inferred, when the transaction is voluntary, and pressure negatives this intent, but not the contemplation of insolvency (see authorities already cited; see also *Nunes v. Carter*, L. R. 1 P. C. 348.)

In the United States it is held, that the intent must be an intent on the part of the debtor, and unless the debtor at the time knew that he was insolvent or contemplated insolvency, he could have no intent to give a preference to one creditor over another. If a person, while paying one creditor honestly, supposes that he is able to pay every creditor, there can be no intent to give a preference (re *Diblee*, 2 B. R. 617; see also *Newton v. Ontario Bank*, 15 Grant, 289). The Act was designed to secure an equal distribution of the property among the creditors, and any transfer made with a view to secure the property or any part of it to one, and thus to prevent such equal distribution is a transfer in fraud of the Act (*Toof v. Martin*, 6 B. R. 49; *Wakeman v. Hoyt*, 5 Law Rep. 309).

It is not a fraudulent preference if the act is done in consequence of pressure or importunity on the part of the creditor though no threat is used (*Crosby v. Crouch*, 2 Camp. 166); if, in fact, anything is done by the creditor to interfere with or control the debtor's will, the act will not be a fraudulent preference (ex parte *Trickett*, 29 L. T. N. S. 73); and if there is a *bona fide* ap-

plication or pressure on the part of some person having a right to apply, and the act in any degree proceeds from such application or pressure, it is not entirely voluntary, and is not a fraudulent preference, though the debtor may have been in some degree animated by a desire to favour the creditor (*Edwards v. Glyn*, 2 E. & E. 20; *Bills v. Smith*, 34 L. J. Q. B. 68); and where a creditor had issued execution, and seized the debtor's goods, and the latter sold the goods to the creditor with a view of making his title indefeasible, this was held a fraudulent preference (ex parte *Pearson*, L. R. 8 Ch. App. 667).

To constitute a fraudulent preference it must be shown that the insolvent acted voluntarily and with the view of giving a preference (*Groom v. Watts*, 4 Ex. 727; *Brown v. Kempton*, 19 L. J. C. P. 169).

If the act is done under pressure it will not be void. It is, however, impossible to declare the minimum of language or of conduct on the part of a creditor which will be strong enough to remove the volition of the debtor. A request by the creditor is sufficient, and it is not necessary that there should have been pressure by the creditor, or an apprehension by the debtor that he would be in a worse position by not making the payment, or otherwise complying with the creditor's request. It is enough if the moving cause were the solicitation of the applicant, and not the desire of the debtor himself to defeat the general distribution of his property (*Mogg v. Baker*, 4 M. & W. 348; *Van Casteel v. Looker*, 2 Ex. 691).

In one case the creditor, who lived twenty miles from the insolvent, had a mortgage on the insolvent's house for \$900, of which \$400 was due. On the 8th February he wrote to the insolvent to call and arrange matters the next time he was in; and on the 9th he purchased from the insolvent about \$1,400 worth of pork, on the condition that \$600 should go upon the mortgage and he paid the balance of the purchase-money to other creditors. An attachment in insolvency issued on the 3rd March, and the assignee brought his suit against the creditor to avoid the transaction. The creditor said he did not wish to press the debtor in any way but wanted his money. The debtor owed

about \$3,000, and his property produced only 1,000. There was contradictory evidence as to the defendant's knowing, or having probable cause for believing that the debtor was unable to meet his engagements, and as to whether the property mortgaged was worth more than the balance due upon it. It was held that the insolvent could not, under the circumstances, be said to have acted voluntarily, within the meaning attached to that word by the decided cases (*Campbell v. Barrie*, 31 Q. B. U. C. 279; see as to what constitutes pressure, re *Hurst*, 6 P. R. U. C. 329-333).

In order to constitute pressure, it is not necessary that legal proceedings should have been resorted to, for if the pressure was such that it overweighed the insolvent's own inclination, and induced him to act against his will, that is sufficient pressure within the meaning of the insolvent laws (*De Tastet v. Carroll*, 1 Stark. 88; ex parte *Scudamore*, 3 Ves. 65; *Belcher v. Prittie*, 10 Bing. 408).

A transfer of goods by a party knowing himself to be in insolvent circumstances, and afterwards becoming insolvent, to a creditor in payment of his claim, is a fraudulent preference, and void if the necessary result of the transfer is to cause the debtor to close up his business, and prevent him from paying his other creditors (*Marsh v. Sweeny*, 12 C. L. J. N. S. 18; 2 Pugsley, 454).

Traders who had been in business for about eight months, and were, at the end of that time, in insolvent circumstances, had sent an order for goods to their largest creditor, whose account against the firm had increased to double the amount it was originally agreed it should be. The goods were packed up, but not sent for some days, when one of the firm waited on the creditor, taking with him a list of the debts due the firm, intending by arrangement with his partner, to offer to assign to the creditor such of these accounts as the creditor should select; the creditor had given orders that the goods should not be sent until he saw one of the insolvents, and on the latter calling on the creditor, he demanded something in cash, and the insolvent informed him that he could not make the payment, but offered an assignment

of the accounts, which the creditor accepted. It was held that this was sufficient pressure on the part of the creditor to prevent the assignment being considered as a preferential one within the meaning of the Act (*Keays v. Brown*, 22 Grant, 10).

M. was the owner of a warehouse, and agent for T. & W., and held for them a quantity of grain, which he refused to give up till paid \$1,400 owed him by T. & W. The latter were in insolvent circumstances, and W. had absconded. After several applications for payment by M. to T., the latter agreed to transfer to him his interest in a vessel in satisfaction of the debt. This was done by a bill of sale, made on the 28th November, 1872, which being irregular in form, another was executed on the 5th of December. T. & W. were declared insolvent on the 12th of December. The grain was given up by M. on the 28th November, upon execution of the first bill of sale. The Court held that the sale of T.'s interest in the vessel was not a fraudulent preference, for the bill of sale was executed by T. under pressure, and on the express condition that the grain should be delivered up to him (*McFarlane v. McDonald*, 21 Grant, 319).

A mortgage, covering the whole of the debtor's property, is not under all circumstances, void on that ground. Where the mortgage is given under pressure by the creditor three months before the assignment, and there is no intent to defeat or delay creditors, the mortgage will be good, though the mortgagor knew, or had strong reasons to believe himself to be insolvent, when he gave the mortgage (*Archibald v. Haldan*, 31 Q. B. U. C. 295).

In this case, however, there was no evidence that the creditor was aware of the insolvent circumstances of his debtor. The principal arguments against the mortgage were, that it covered all the debtor's property, and as it contained no proviso allowing the debtor to continue in possession until default it enabled the mortgagee to put a stop to the debtor's business, by taking possession of the property mortgaged (see *McAulay v. Allen*, 20 C. P. U. C. 417; see ante p. 43).

Under the authorities, the payment or satisfaction of a debt, the result of pressure on the part of the creditors, where it is made in the ordinary course of business, can stand, although at the time

the debtor was insolvent. But if the debtor is insolvent at the time, to the knowledge of both parties, and the transaction is a transfer of the whole estate without any equivalent and cut of the ordinary course of business, and causing a stoppage of the business, it is more difficult to support it on the ground of pressure. Thus, a trader who was indebted to the amount of \$8,000, and claimed to have assets consisting of stock in trade, book, and other debts, due to him to the amount of about \$8,500, agreed with one of the creditors to sell off his entire stock in trade, procure notes therefor, and hand same over to the creditor in discharge of his claim, which was accordingly done by the debtor, to an amount of about \$6,000, leaving only the book debts, which it was shown would pay not more than 25 per cent. on the claims of the remaining creditors; at this time, about one-half of the claim of the creditor so paid off, was not due; it was held, that under the circumstances, this was a preferential assignment within the meaning of the Insolvent Act and as such fraudulent and void, against the general body of creditors, and that it could not be supported as having been procured by pressure (*Davidson v. McInnes*, 22 Grant, 217; affirmed on appeal, 24 Grant, 414).

Mortgages, by an insolvent, to secure an antecedent debt, if given voluntarily or spontaneously, in contemplation of insolvency, are wholly void. But if a mortgage is obtained by pressure without any knowledge that the debtor is insolvent, and the mortgage is in such a form that the creditor is not enabled to at once put a stop to the debtor's trade, the mortgage will be valid, where there is still a substantial portion of the assets left for payment of the creditors. A mortgage was obtained by urgent pressure from an insolvent person, more than three months before he executed an assignment in insolvency. The mortgage was for an antecedent debt, and was not enforceable for two years. It comprised the mortgagor's mill property, and left untouched about one-third of his assets. It was not executed by the mortgagor in contemplation of insolvency, or with intent to give the mortgagee a preference, and at the time of obtaining it, the latter was not aware of the mortgagor's insolvency. In a suit by the assignee in insol-



vency, impeaching the transaction, the mortgage was held to be valid (*McWhirter v. Royal Can. Bank*, 17 Grant, 480).

. But if the mortgage covers the whole of the debtor's assets, or if it covers so much, or such part, as necessarily stops the mortgagor's trade, or prevents it being carried on in its usual and ordinary course, or enables the mortgagor forthwith to put a stop to the business, it will be void (*Johnson v. Fesemeyer*, 25 Beav. 88; *Lindon v. Mason*, 6 M. & Gr, 895; ex parte *Bailey*, 3 De. G. M. & G. 534-6; *Stanger v. Wilkins*, 19 Beav. 626).

Thus where a creditor, aware of the desperate circumstances of his debtor, obtained from him, by pressure, a mortgage on his chattels used in his business, and it did not appear that he had any other property at the time, except some book debts; the mortgage was held void, it having the effect, under the circumstances, of stopping the debtor's business (*McWhirter v. Royal Can. Bank*, 17 Grant, 480).

A mortgage obtained by pressure from an insolvent, may be good, though the debt secured was not payable at the time of making the mortgage, and, therefore, the law sanctions the doing under pressure, what the creditor has not the power to compel (*Strachan v. Barton*, 11 Ex. 647).

It was decided in Prince Edward Island in 1870, that to sustain a charge of undue preference, the payment or transfer must be voluntary—i.e., originating with the debtor, and made with the intent to prevent the equal distribution of his assets among his creditors. If it is made in consequence of threat or pressure by the creditor it is not voluntary, nor if it originated in a *bona fide* application by the creditor (re *Bell*, Peters Reps. P. E. I. 211).

The law will not presume an intent to prefer when the debtor is not aware of his insolvency, but it is incumbent on him to show it (re *Oregon Printing Company*, 13 B. R. 503). No particular or specific evidence of an intent to prefer is necessary when a payment is made by an insolvent debtor, for the Act itself is sufficient evidence of the intent (ib.).

If a bank merely certifies the cheque of a debtor in advance, relying on his promise to make his account good during the day, such an overdraft in the absence of fraud creates simply the relation

of debtor and creditor and the payment of such a debt after insolvency occurs is an act of bankruptcy (*Payne v. Solomon*, 14 B. R. 162). The intent of a debtor to prefer, coupled with an attempt to do it is an act of bankruptcy, although the instrument is so defective as to be void (re *Mendelsohn*, 12 B. R. 533).

Fraudulent assignments of a part of a debtor's property mostly consist of fraudulent preferences, but it is submitted that an assignment of part of a debtor's property may be fraudulent *as against creditors*, even though there be no preference of a creditor or creditors. It is clear that a conveyance of the whole of a debtor's property in respect of a past debt is only fraudulent in respect of the defeat or delay of the creditors at large, which necessarily must result therefrom, and which is therefore presumed to have been intended by the debtor, which shows that intent to delay in itself renders fraudulent in the eye of the bankruptcy law a transaction, otherwise unobjectionable; and it would seem to follow that any transfer even of part of a debtor's property which has for its object a fraud on the creditors is an act of bankruptcy, even though the object be not to prefer a creditor or creditors, and even though the transaction did not fall within the Statute of Elizabeth, *e. g.*, any transaction which is intended to induce creditors to hold their hands and not press for just debts, such as a scheme to avoid the publicity of a debtor's embarrassments which the Bills of Sale Act ensures will amount to an act of bankruptcy if the jury conclude that the object of the arrangement was to deprive creditors of their rights under the bankruptcy law (*ex parte Pearson*, L. R. 8 Ch. 667; *ex parte Cohen*, L. R. 7 Ch. 20).

But where a trader gave one of his creditors a bill of sale of all his property to secure a then existing debt and a fresh advance, and it was verbally agreed that the bill of sale should not be registered, but that the grantor should give a new bill of sale in substitution for the first when required to do so by the grantee: more than two months before the grantee filed a liquidation petition, a new bill of sale was given and was registered, and the grantee put a man in possession of the property: but the grantor's name remained on the premises as the ostensible occu-

pier of them: it was held that there having been a sufficient fresh advance when the first bill of sale was given, the substituted bill of sale was good as against the trustee in the liquidation (re *Jackson*, L. R. 4 Ch. D. 682; ex parte *Cohen*, L. R. 7 Ch. 20; and ex parte *Stevens*, L. R. 20 Eq. 786, distinguished).

The fact that the debt to secure which the debtor assigns the whole of his property, is much less in value than the property assigned, so as to create a valuable resulting trust in favour of the assignor, does not prevent the assignment from operating as an act of bankruptcy, because the surplus beyond the debt secured would not be liable to be taken in execution, and the common law remedies of other debtor's against their creditor's estate would be thereby barred and they defeated and delayed (*Smith v. Cannan*, 22 L. J. Q. B. 290; ex parte *Luckes*, L. R. 7 Ch. 302).

The fact that the present advance is, to the knowledge of the person making the advance, intended to pay off an existing secured debt, and thereby to relieve the debtor's estate from a liability to a distress or any other charge, does not, it has been held in many cases, prevent such advance from saving the assignment from being an Act of bankruptcy (see *Whitmore v. Claridge*, 31 L. J. Q. B. 141). But until recently, this has never been held in respect of advances intended to pay off an unsecured debt. In the recent case, however, of ex parte *Reed* (L. R. 14 Eq. 586), it was held that payment of bills by the drawer at the request of the acceptor, who in consideration thereof assigns to the drawer all his property to secure the amount and also some past debts, is a substantial advance and prevents the assignment from being an act of bankruptcy (see also ex parte *Swilchenbart*, 3 M. & De G. 671).

In April, 1869, A. lent money to B., on an express agreement that it was to be secured by mortgage on certain property, and on the 3rd of July following the mortgage was given accordingly, at the request of the mortgagee's agent, and in fulfilment of the promise made at the time of the loan. On the 2nd of August in the same year, the mortgagor became insolvent, the mortgage was, nevertheless, upheld under the section of the Act of 1864 corresponding to this, for there was sufficient pressure by virtue of

the agreement to take the case out of the Statute (*Allan v. Clarkson*, 17 Grant, 570).

Strong, V. C., in giving judgment, expressed an opinion that section 131 would not apply to such a case as the above, inasmuch as it could not be said that the mortgage injured or obstructed creditors, and if the section did apply, he would only give relief by ordering that the mortgage be redeemed.

A payment made by the insolvent in good faith, in the ordinary course of business, for a good consideration, and not in contemplation of insolvency, cannot be set aside though made a day or two before an assignment. Where the clerk of the insolvents, who were bankers, on the day before their assignment, and in the ordinary course of business, paid a cheque for which they were liable, without any knowledge of the intended assignment, it was held that the payment was not null and void within section 89 of the Act of 1869 (*City Bank v. Smith*, 20 C. P. U. C. 93), and was not a fraudulent preference.

The payment will not be void under this section unless some other creditor of the insolvent is injured thereby. A payment, therefore, of money, which would not in any event have passed to the assignee, for the benefit of the other creditors, will not be void under this section. The payment must be unjust to the other creditors, and must deprive them of some advantage which they would otherwise have possessed. Where the money paid is beyond the reach of our laws, and would not form any part of the insolvent's estate for distribution, the payment will be good. Thus, in one case an insolvent absconded to the United States, taking money with him. He was followed by the agent of a person in this country, who had become surety for him, and by threats of criminal proceedings, induced to pay the agent of the surety the amount for which he had become liable. The payment being made in a foreign jurisdiction, the Court held that it was not void within this section, and that the assignee was not entitled to recover it back for the benefit of the estate (*Roe v. Smith*, 15 Grant, 344).

Where A. was indebted to B., and the latter was indebted to C. and it was arranged between the parties that C. should take A.

as his debtor, and should credit B. with the amount due from A. to B., and the latter should discharge A., and in pursuance of this agreement A. gave his note payable to C. or bearer within thirty days. Afterwards B. became insolvent, and his assignee brought an action against C. to recover the note. It was held that he could not recover, for the note never was the insolvent's property, and so never passed to the assignee, and even if the transaction was void A. was still indebted to the estate, and he was the proper person to be sued (*McGregor v. Hume*, 28 Q. B. U. C. 380).

Where there are no other dealings between the parties, and a merchant sells goods to a debtor on the express understanding that a chattel mortgage shall be given to secure the price, the mortgage will be valid, and where a chattel mortgage for \$2,000 was given, and the mortgagor testified that he was not insolvent, having real estate and a claim against a railway company for \$100,000, and available property to satisfy executions against him he further stated that the mortgage was given for the price of the property covered by it being household furniture, which he had bought from the mortgagee, and that the terms of his purchase were cash, but being disappointed in getting the money to pay he had offered either to let the mortgagee take back the furniture, or to give him a mortgage upon it, and the mortgagee accepted the latter alternative: it was held that this in effect amounted to a resale of the furniture by the mortgagee, and the mortgage given under the circumstances was not a preference, though at the time it was given there were unsatisfied judgments and executions against the mortgagor (*Hersee v. White*, 29 Q. B. U. C. 232).

There is a great distinction between the case where a part of the debtor's estate is made over to a creditor as payment or security for an existing debt, and the case where the person advancing money to the debtor, or buying goods from him, had no previous dealings whatever. Where a person becomes a creditor only by the actual advance for which he obtains security, such security will hold good, and a sale of property by the debtor where he obtains a full equivalent will be valid, though an assignment is made immediately afterwards. Even if a debtor, in contemplation of insolvency, and

when unable to meet his engagements, and within the thirty days, executes a chattel mortgage to a person who advances money in the ordinary course of business, without knowledge of the debtor's intentions, and on the distinct understanding that the mortgage shall be given as security, the security cannot be impeached where it appears that the mortgagee only became a creditor by the actual transaction in which he gave an equivalent for the mortgage (*Mathers v. Lynch*, 27 Q. B. U. C. 244).

One I., being a retail dealer, and wanting goods to carry on his business, asked one M. to endorse notes to enable him to purchase them. To this M. consented, on condition that I. on receiving the goods should secure him against loss by a mortgage thereon and on the other goods in I.'s store, who was to sell them at his store only, and out of the proceeds retire the notes, and if he should sell otherwise M. might sell the goods for his own protection. M. accordingly endorsed, and I. with the notes purchased goods, which he mortgaged to M. as agreed on, with other goods for the *bona fide* and sole consideration of perfecting the said agreement. I. afterwards, and within thirty days from the date of the mortgage, but without M.'s consent made a voluntary assignment to an official assignee. This mortgage was upheld as against the assignee (*Mathers v. Lynch*, 27 Q. B. U. C. 244).

It did not appear whether the mortgage covered all the debtor's property, and the mortgagee was ignorant of any contemplation of insolvency on the part of the debtor.

Where a mortgage only includes part of the debtor's property, and does not include his stock in trade, or the property used in carrying on his business, it will be valid. A banking firm in Toronto having become embarrassed by gold operations in New York, applied to the plaintiffs to whom they owed \$50,000 to advance them \$15,000 more, and in order to obtain the advance, they offered (believing that otherwise the further advance would not be given), to secure both debts by a mortgage on the real estate of one of the partners, worth \$30,000. The plaintiffs agreed, made the advance, and obtained the mortgage. The mortgage did not cover the mortgagor's personal property, or any private property of his partner, or any property of the firm. In

less than three months afterwards, the debtors became insolvent under the Act. They were indebted beyond their means of paying at the time of executing the mortgage, but they did not consider themselves so, nor were the mortgagees aware of it. The mortgage was not given from a desire to prefer the mortgagees over other creditors, but solely as a means of obtaining the advance which the debtors fully expected would enable them to go on with their business, and pay all their creditors. The Court held that as to the antecedent debt, the mortgage was valid against the assignee in insolvency, and no question was raised as to the contemporaneous advance (*Royal Can. Bank v. Kerr*, 17 Grant, 47).

It is not an unjust preference when the transfer is made in pursuance of an agreement made more than thirty days before the insolvent became involved, and it is incumbent on a party seeking to impeach, as an unjust preference, a transaction between a debtor and his creditor, occurring more than thirty days before insolvency, to prove that such transaction took place in contemplation of insolvency.

A. owned a barley mill, which he was endeavouring to sell to one T., whose notes he was to accept in payment, and in December, 1875, he arranged with C. that these notes were to be handed over in security for all his notes under discount. Subsequently, and on the 7th of February, 1876, the sale to T. having fallen through, he executed a memorandum in writing, transferring to C. as "collateral security against paper discounted for me, my right, title and interest, in a barley mill \* \* \* keeping the privilege of disposing of the same, and handing to you the promissory notes of the purchaser." It was held that this was not an unjust preference; that the bank having made advances on the faith of having the proceeds of the sale handed over, it was no extension of their security on the sale falling through, to obtain an assignment of the mill itself (*Suter v. Merchants Bank*, 24 Grant, 365).

In May, 1874, A., a manufacturer, opened an account with a bank, representing himself as being in good circumstances, with a capital of \$20,000 over all his liabilities, which was believed by

the bank agent, who thought him doing a flourishing business, and A. then promised to keep C. always well supplied with col-  
 -erals for any accommodation afforded him. In December, 1875,  
 applied to C. for assistance, and proposed that he should ware-  
 -use his goods as manufactured, and pledge the receipts of the  
 -arehouseman to the bank for advances to be made to him, which  
 -posal was acceded to by C. Advances were accordingly made,  
 -which receipts were deposited with C. on the 19th of Janu-  
 -y, 25th of January, 1st of February, and 7th of February. On  
 -e 26th of February, A., in compliance with a demand by some  
 his creditors, executed an assignment in insolvency. On a bill  
 -d to impeach these transactions as an unjust preference, the  
 -urt, being satisfied that they all took place in good faith, and  
 -t in contemplation of insolvency, held that the bank were  
 -titled to hold their lien on such of the receipts as were so de-  
 -sited more than the thirty days before the assignment in insol-  
 -ncy; but in respect of such of them as were deposited within  
 - thirty days, the bank could not claim any lien or priority. It  
 -s held, also, that the same rule was applicable to promissory  
 -tes deposited with the bank, as collateral security (*Suter v. Mer-*  
*-ants Bank*, 24 Grant, 365).

It would seem that any payment or preference to an indorser  
 other surety is fraudulent and void where the other elements  
 ist to give it that character. The payment of an indorsed note  
 fore maturity by an insolvent debtor is a preference to the in-  
 -rser, and the money may be recovered from him (*Ahl v. Thorner*,  
 B. R. 118), and though the indorser is solvent, and the holder  
 -uld, therefore, be able to recover the amount of the note from  
 n, yet the payment to the holder may be a preference *as to him*,  
 -he other circumstances exist, and the amount may be recovered  
 -m the holder (*Bartholow v. Bean*, 10 B. R. 241).

When the surety or indorser is innocent of all participation in  
 y scheme by the principal debtor to contravene the law, and the  
 -bt is paid at or before maturity without any action on his part,  
 -is not liable (*Bean v. Laflin*, 5. B. R. 333).

A trader, being in embarrassed circumstances, sold out his busi-  
 -ss, and out of the proceeds satisfied a promissory note on which



his brother was indorser before it had become due, and shortly afterwards went into insolvency. The evidence did not show that the indorser was aware or was a party to the payment in any way, and it was by no act of his that the note was paid. Under these circumstances the Court held that the assignee in insolvency had no right to call upon the indorser to refund the amount of such note; but where the payment of the note had been procured by the indorser, he was, under this section, held liable to make good the amount thereof (*Botham v. Armstrong*, 13 C. L. J. N. S. 88; s. c. 24, Grant. 216).

Where the probable consequence of an act is to give a preference, the debtor will be conclusively presumed to have intended to give such preference (in re *Drummond*, 1 B. R. 231; re *Black*, 1 B. R. 353; re *Sutherland*, 1 B. R. 531; re *Diblee*, 2 B. R. 617; re *Wells*, 3 B. R. 371; *Curran v. Munger*, 6 B. R. 33).

When a debtor is insolvent, and knows it, any payments then made by him to any creditor, in full, are with intent to prefer. The giving of a preference is a necessary consequence of the payment by an insolvent debtor of one of his creditors. The creditor is preferred because he has received his debt, and the other creditors have not. The debtor, being insolvent, has not the means to pay them, and, by paying one in full, has defrauded the others of their just proportion of his estate. Other motives may have actuated the debtor, but that makes the payment none the less a preference. Indeed, he may expect to become able in time to pay all his creditors in full and may intend to do so as soon as he can, but this does not affect the question. The creditor whose debt is paid is nevertheless preferred; he has his money, but they must depend upon the often double uncertainty whether their debtor will, in time, become both able and willing to pay their debts in full (*Farrin v. Crawford*, 2 B. R. 602; re *Silverman*, 4 B. R. 523).

If a debtor is insolvent at the time of making a payment, he is presumed to know it until the contrary appears (in re *Silverman*, 4 B. R. 523).

A mortgage of the whole stock in trade to a pre-existing creditor is *prima facie* a preference. It is very strong evidence.

because it is out of the ordinary course of business, and is of itself enough, if duly recorded, to destroy the credit of any trader, and, therefore, would not be resorted to by any one who had readier means of paying the debt (in re *Waite*, Lowell, 407). Though insolvency, in fact, exists yet if the debtor honestly believes he shall be able to go on in his business, and with such belief pays a just debt without a design to give a preference, such a payment is not fraudulent though bankruptcy should afterwards ensue ; and, on the other hand, if the debtor, being insolvent, and knowing his situation, and expecting to stop payment, shall then make a payment or give security to a creditor for a just debt, with a view to give him a preference over the general creditors, such payment or giving security is fraudulent as against the creditors. It rests upon the intent with which the act was done, and the intent is to be proved as a fact, either by direct evidence or as the necessary and certain consequence of other facts clearly proved (*Morgan v. Mastick*, 2 B. R. 521 : *Doan v. Compton*, 2 B. R. 607).

A preference to an employee is an act of bankruptcy (in re *Kenyon and Fenton*, 6 B. R. 238).

The fact that the debt is fiduciary debt is of no consequence ; the debtor has no more right to pay it than any other debt. There is no distinction between giving a preference when a creditor asks for it, and giving a preference when a creditor does not ask for it (in re *Diblee*, 2 B. R. 617 ; in re *Batchelder*, 3, B. R. 150).

The motives of the debtor in committing the act are immaterial. It is no defence that other considerations were the moving cause. Motive should not be confounded with intent. When he intends to do the thing which necessarily hinders and defeats the act, he, in judgment of law, knows when he does it that it will have that effect. Knowing the effect, he must intend to produce it when he voluntarily chooses to do the act. Whatever his motive is, he acts voluntarily in choosing, and, therefore, of intending all the legal results which flow from his action in the matter (*Hardy v. Binninger*, 4 B. R. 262).

There is nothing in the insolvent law which interdicts the loan-

ing of money to an insolvent, if the purpose is honest and the object not fraudulent; and it makes no difference that the lender had good reason to believe the borrower to be insolvent; if the loan was made in good faith, without any intention to defeat the provisions of the Insolvent Act. It is not difficult to see, that, in a season of pressure, the power to raise ready money may be of immense value to a man in embarrassed circumstances (*Tiffany v. Boatman*, Sav. Inst. 9 B. R. 245). So a fair exchange for value may be made at any time, even if one of the parties to the transaction is insolvent. There is nothing in the Act, either in its language or object which prevents an insolvent from dealing with his property; selling or exchanging it for other property at any time before proceedings in insolvency are taken against him; provided such dealing is conducted without any purpose to defraud or delay his creditors, or give a preference to any one, and does not impair the value of his estate (*Cook v. Tullis*, 9 B. R. 431; *Clark v. Iselin*, 11 B. R. 337).

The purpose of the Act being to enforce the equal distribution of an insolvent's estate, every act of an insolvent, that tends to defeat that purpose, should be construed strictly as against him, and Courts should indulge every presumption that is permissible according to well-settled rules of law, to secure the full benefit of the cardinal principle of the law. The Act ought not to be construed to prevent the exercise of reasonable *bona fide* efforts on the part of an energetic and hopeful debtor struggling with an honest intention to pay all his debts (*Wager v. Hull*, 5 B. R. 181; *Clark v. Iselin*, 11 B. R. 337).

The Act has far less reference to the condition of mind of the insolvent debtor, than to the condition of insolvency as a fact. When a debtor knows that he is insolvent he must wait, before he gives a preference, until he knows that his condition is changed, or that his creditors' consent to the preference. It is a general principle, to which there are no exceptions, that where the parties know the insolvency, they must act at their peril, if they appropriate the trust fund, which the law devotes to the equal payment of all, before they also know that creditors have ceased to be such, or that they consent, after the most full and

fair disclosures, to the discrimination which is made. It is irrelevant, that they thus erroneously supposed that creditors had consented. Their careless, rash, or interested conclusions give them no power over the statutory vested rights of innocent and non-concurring creditors (*Curran v. Munger*, 4 B. R. 295; s. c. 6 B. R. 33).

The Act of 1864 applied to mortgages of real estate to a creditor by way of preference. But where the mortgagor did not believe that he was insolvent (though the mortgagee feared he was so), and made a mortgage of real estate under pressure from the mortgagee, and in the belief that he (the mortgagor) would thereby be enabled to continue his business, and pay his liabilities in full, the mortgage was held valid as against his assignee in insolvency (*Curtis v. Dale*, 2 Ch. Cham. 184). An arrangement *bona fide* entered into for the purpose of enabling the debtor to discharge his obligations will be valid (*Risk v. Sleeman*, 21 Grant, 250).

Previous to an act of insolvency, certain lands in which the insolvent, a defendant in a suit in Chancery, had an equitable interest, had been ordered to be sold, and were afterwards sold, and the purchase-money paid to the plaintiff in equity. The assignee in insolvency moved that such moneys be paid into Court for the benefit of the general creditors. It was held that such lands were subject to the order for sale, and the motion was refused, with costs; but the assignee was considered entitled to his costs out of the estate, as the question was a new one, and a proper one for him to raise in the interest of the general creditors (*Yale v. Tollerton*, 2 Ch. Cham. 49).

A conveyance, void against creditors, was made in December, 1868, through a third party, to the owner's wife; the husband, in November, 1869, became insolvent, and in June, 1870, joined his wife in a sale of the property to a purchaser without notice; a conveyance to the purchaser was executed and registered, and the purchaser gave the wife a mortgage for part of the purchase-money, and paid her the residue in cash. On a bill by the assignee in insolvency, he was declared entitled to the mortgage and to any of the money which still remained in the wife's hands and

to any property, real or personal, which she had purchased with the residue and still owned ; but the Court refused to direct an enquiry whether she had separate estate in order to charge the same with any of the residue which had been spent by her, or with the costs of the suit (*Saunders v. Stull*, 18 Grant 590).

Under the 11th section of the English Act of 1869, the bankruptcy of a debtor is deemed to have relation back to the act of bankruptcy on which the order is made adjudging him bankrupt. We have no similar clause in our Act ; the title of the assignee relates to the time of the assignment or the issue of the writ of attachment, and has no anterior relation. It was stated in *Churcher v. Cousins* (28 Q. B. U. C. 540), that fraudulent preferences must be continuing at the time the assignee's title accrues to enable him to question it. This was on the authority of *Marks v. Feldman* (L. R. 4 Q. B. 481), before the case was reversed on appeal (see L. R. 5 Q. B. 275). The decision, however, in *Churcher v. Cousins*, was that this doctrine did not apply to transactions which were made void by Statute, as those under this and the 134th section.

On appeal in *Marks v. Feldman*, the Court declared that, except so far as it may or may not be an act of bankruptcy under the provisions of the bankruptcy Statutes, the doctrine of relation has no application to a fraudulent preference. In case of fraudulent preference, therefore, it is not necessary that there should be relation back to enable the assignee to avoid the transaction, in other words the preferences need not be continuing when the assignee's title accrues ; and whether the defendant at the time of the accrual of the assignee's title retains the goods, or has converted them into money, the transaction still retains its original character, it is good and valid as between the parties, but voidable by the assignee. If the conversion is after the assignee's title accrues he may sue in trover, but if the conversion is before, an action for money had and received is the proper remedy after demand in each case (*Marks v. Feldman*, supra). In *Churcher v. Cousins* (supra), the insolvents two days before their assignment, sold goods, taking a note for the price and paid this note over to the defendant before the assignment, under circumstances bringing it within the sec-

tion of the Act of 1864, corresponding to sections 133 and 134 of this Act; it was held that the assignee might recover in trover, these sections making the transaction null and void as against the assignee, though *Marks v. Feldman* is an authority that the assignee may recover when the transaction is voidable only.

In *Marsh v. Sweeney* (2 Pugsley, 454), the Court expressed an opinion that the words "in contemplation of insolvency" did not necessarily mean contemplation of an assignment under the Act. In *Davidson v. Ross* (24 Grant, 22), the Court did not express a decided opinion on the meaning of these words, but seemed to assume that contemplation of insolvency meant contemplation of an assignment or proceedings under the Act, or having insolvency in prospect. Patterson, J., says (ib. p. 69) "I take the object of the law to be to make it the duty of a trader who, from the knowledge which he has of his own affairs or of the intentions of his creditors, has reason to apprehend either that proceedings under the Act will be taken against him or that he may have to resort to the Act for relief, to do nothing which will prejudice the rateable distribution of his assets, by giving one creditor an unjust preference over the others; and I apprehend that, if under such circumstances he gives a preference, he does so in contemplation of insolvency, whether he does it from a desire to favour the preferred creditor or only because that creditor has succeeded by urgency in overcoming his reluctance to give the preference."

The expression in this section "in contemplation of insolvency," means that the sale, deposit, pledge or transfer is made for the purpose of preventing "the subject thereof" from coming into the hands of creditors, into whose hands it would otherwise fall. The Statute contemplates a dealing between the debtor and one of several creditors; and where the person to whom the pledge or transfer is made, is not a creditor at all, or only becomes a creditor by advancing money on the security of the pledge or transfer, the Act does not apply. Thus, where A., having manufactured a quantity of goods (a number of oil barrels), for a customer, drew upon the latter for the price, and applied to a banker to cash the draft. The latter agreed to do so upon receiving a lien upon the goods, which was given, and the bill

cashed accordingly. On the following day, the debtor made an assignment to an official assignee, and it was held that this transaction was not within either the terms or the spirit of this section (*Newton v. Ontario Bank*, 13 Grant 652; affirmed in appeal, 15 Grant 283).

Under this section, when the act has been done in contemplation of insolvency, and has been done more than thirty days before insolvency happens, the act is made null and void, on proof that it was done in contemplation of insolvency, and that it gave an unjust preference to the creditor. In such case, however, there must be proof that the transaction was entered into in contemplation of insolvency (*Suter v. Merchants' Bank*, 24 Grant, 365). But when the act is done within thirty days, no proof of any kind is required to impeach it, on the ground of its being made in contemplation of insolvency. It is presumed to have been done in contemplation of insolvency, and it is impeached by the mere fact of the time when it was done, *i.e.* in so far as being made in contemplation of insolvency will render it void.

According to the opinion of Mr. Justice Wilson in *Campbell v. Barrie* (31 Q. B. U. C. 291), in the latter case the transaction would not be null and void without further evidence tending to show whether it was founded on consideration, whether the debtor was then able to meet all his engagements, whether in fact there was an unjust preference within the section. Though no evidence of its being in contemplation of insolvency is required when the presumption operates, yet in that case there must be proof of facts shewing an unjust preference within the section (see also *Churcher v. Cousins*, 28 Q. B. U. C. 540; *Newton v. Ontario Bank*, 13 Grant 652; s. c. 15 Grant 283; 40 Vict. s. 29).

If the sale is made more than thirty days before the assignment, the *onus* is on the party seeking to impeach the sale (*Marsh v. Sweeny*, 2 Pugsley, 454).

The insolvent, about two months before the issue of a writ of attachment against him, assigned to defendant, a creditor, a policy of insurance upon certain merchandise in security for a debt which was about to be placed in suit, and the insurance com-

pany, upon the occurrence of a fire, paid over the proceeds of the policy to the creditor, to the extent of the debt secured thereby. At the trial, the plaintiff, who claimed, as assignee to recover this amount, called the insolvent, who swore that when he assigned the policy he had no contemplation of insolvency; that his intention was, with his remaining assets, and the residue of the money derived from the policy after paying defendant to re-open his business, but that he was driven into insolvency by the act of a certain creditor who, though he had promised him time, sued out a writ of attachment against him. It was held that the transfer of the policy not having been made within thirty days of the issue of the writ of attachment, the *onus* was cast upon the plaintiff, of proving that the transfer was made in contemplation of insolvency, and that the above facts were insufficient to sustain that contention (*McWhirter v. Thorne*, 19 C. P. U. C. 302; *City Bank v. Smith*, 20 C. P. U. C. 93).

It was held in Prince Edward Island that an assignment to a creditor by an insolvent person, after service of process under pressure, did not deprive the prisoner of his right to a weekly allowance under the Insolvent Act (re *McKay*, Peters Reps., P. E. I. 195).

There is no note to the case to show what Act the decision has reference to.

134. Every payment made within thirty days next before a demand of an assignment, whenever such demand shall have been followed by an assignment, or by the issue of a writ of attachment, or within thirty days next before the issue of a writ of attachment, under this Act, when such writ has not been founded upon a demand, by a debtor unable to meet his engagements in full, to a person knowing such inability, or having probable cause for believing the same to exist, shall be void, and the amount paid may be recovered back by suit in any competent court, for the benefit of the estate: Provided, always, that if any valuable security be given up in consideration of such payment, such security or the value thereof, shall be restored to the creditor before the return of such payment can be demanded.

The payment will come within this section, though the party to whom the payment is made is only an indorser of the notes of the insolvent (*Churcher v. Cousins*, 28 Q. B. U. C. 540), and it



seems that the word "person" in the section would include a surety as well as a stranger (*Roe v. Smith*, 15 Grant, 344).

After the execution of a deed of assignment or the issue of a writ of attachment, all money belonging to the debtor is the property of the assignee, and even if paid to a creditor may be recovered by the assignee for the benefit of the estate (*Roe v. Royal Canadian Bank*, 19 C. P. U. C. 347; *Roe v. Bank of British North America*, 20 C. P. U. C. 351), though the payment is in satisfaction of a *bona fide* debt and the person receiving payment is ignorant of the issuing of the writ of attachment or the execution of the assignment (ib.; citing (*Tarquand v. Vanderplunk*, 10 M. & W. 180).

In these cases, however, the moneys paid were proceeds of the insolvent's estate, which passed to the assignee, and not earned after insolvency. When after an assignment and before discharge, the insolvent obtains a sum of money and pays it away *bona fide* and without collusion to a person becoming a creditor after the assignment, the payment is good and cannot be recovered for the benefit of the estate (ex parte *Dewhirst*, 25 L. T. N. S. 731; L. R. 7 Ch. App. 185).

In the case referred to, the bankrupt after his bankruptcy entered into an agreement to serve a merchant for a salary of £500 a year, and on the latter dissolving the agreement without cause he allowed £200 to the bankrupt by way of compensation. It was out of this sum, that the payment was made by the bankrupt for the rent of a house that he had taken after the bankruptcy. The Court, however, intimated an opinion that the trustee, on giving notice to the bankrupt's employer, might have intercepted the money and prevented it being paid to the bankrupt (see also re *Dowling*, L. R. 4, Ch. D. 689).

It was held by the majority of the Court in *Churcher v. Johnston* (34 Q. B. U. C. 528), that an agreement made verbally between a trader and his creditor that the latter should advance sums of money to the trader for the purpose of enabling him to carry on his business upon the express agreement between them, that the money advanced should be repaid by the trader out of the proceeds of the daily sales of the trader's goods, gave the

creditor an equitable claim and mortgage on the goods, which, under the latter part of this section, was a valuable security given up in consideration of the payment, and that the repayment by the trader to the creditor of the moneys advanced within thirty days before making the assignment did not render the payment void or recoverable under this section, being protected by the proviso, though the creditor knew at the time the payments were made that the trader was unable to meet his engagements. The majority of the Court held that, the creditor having a valuable security under this section, the assignee could not recover the payments without restoring the security before the commencement of the action. In this case the moneys were advanced at the request of the trader, and it seems clear that if the agreement had been by bill of sale duly filed according to the Statute, it would, if made for the purpose of enabling the debtors to carry on their business, have been a valuable security. Morrison, J., who dissented from the majority of the Court, held that the "valuable security" referred to in the section must be a security recognised in law, and which would prevail in the hands of a holder against any creditor, which the creditor when proving could shew and describe and value, and capable when so valued of being assigned, and delivered to the assignee for the benefit of the estate." The writer dissents from the judgment of the majority of the Court, and concurs in the opinion of Morrison, J. The alleged "valuable security" in this case constituted a mere verbal agreement between the parties. It was not good as against creditors; Wilson, J., declaring that, even if in writing, it would not have been good as against creditors. It was, however, binding as between the parties.

The words "valuable security," in this section, would seem to mean a security that was of value to the creditor (see *Reg. v. Brady*, 26 Q. B. U. C. 13).

They could not be held to signify a security that was void or voidable, and the writer has grave doubts as to whether they refer at all to a security which the creditor holds on the property of, or directly from, his debtor; whether they do not more properly refer to a security from some third person held by the creditor as col-

lateral security for his claim. Did the Court intend to interfere with a creditor who held security from the insolvent or from his estate? On demanding a return of the payment, the security must be restored, the restoration would surely be an affirmation of its validity, and the only benefit that could arise to the creditors would be in the case of the property comprised in the security being of insufficient value. Then the 84th section of the Act would come into operation, and the parties would be in about the same position as before, the creditor having the right to rank for the deficiency. Besides, on payment of the amount of a security, it can scarcely be said to be given up in consideration of the payment. The payment satisfies it and the debtor has a right thereto.

The 92nd section of the English Act provides that every conveyance or transfer of property, and every payment made by any person unable to pay his debts as they become due, from his own moneys, to any creditor with a view of giving such creditor a preference over the other creditors, shall be deemed fraudulent and void if the person making it become bankrupt within three months thereafter, provided that the clause shall not affect the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration. It is held that the Act must be the spontaneous act of the debtor to be void under this clause (*ex parte Topham*, L. R. 8 Ch. App. 614; *ex parte London & C. Bk.* 29 L. T. N. S. 73); and it must also appear either by necessary inference from the circumstances or by direct evidence that the act was done with a view to prefer the creditor. If there is no ground for inferring such a motive, as if a payment is made in the usual course of business, and is *bona fide* on the part of the creditor, it will be protected under the last proviso of the clause (*ex parte Blackburn*, L. R. 12 Eq. 358; *ex parte Butcher*, L. R. 9 Ch. App. 595; 44 L. J. Bk. 129); and it has been laid down generally that a payment in the ordinary course of trade, the honouring bills of exchange presented at maturity, or the payment of debts which have become payable in the usual and customary manner or payments made in fulfilment of a contract or engagement to pay in a particular manner or at a particular time, are not open to any objection on the ground of their being voluntary, even although they were

made without any express demand by the creditor, unless the creditor had at the time notice of an act of bankruptcy committed by the debtor (ib. see also on the English Act *ex parte Mathews*, L. R. 7 Ch. App. 24; *ex parte Putman*, 30 L. T. N. S. 335). This section of our Act is however materially different from the English Act, and the decisions on the latter Act will not apply. It is not necessary that the payment should be made with a view of giving a preference, nor is it necessary that the creditor should obtain an unjust preference by the payment, nor is the element of fraud necessary. If the payment is made within the thirty days, and the debtor is then unable to meet his engagements to the knowledge of the creditor or if the latter has probable cause to believe such inability, the payment will be void without anything further being shewn (see observations of Wilson, J., in *Churcher v. Johnston*, 34 Q. B. U. C. 538, 9; see also *Nunes v. Carter*, L. R. 1 P. C. 342; 4 Moore, P. C., C. N. S. 222, on a somewhat similar enactment of the Legislature of Jamaica, where fraud was held unnecessary).

This section is retroactive in making a payment closed before the assignee's title accrues impeachable by him, and it seems that the doctrine of relation does not apply when the transaction is void (*Churcher v. Cousins*, 28 Q. B. U. C. 540).

The payment, to come within this section, must be made by the debtor himself within the thirty days, the debtor being at the time of payment, unable to meet his engagements, to the knowledge of the creditor. Where more than two months before the assignment in insolvency, the debtor not being then unable to meet his engagements, assigned a policy of insurance, on which a loss had then accrued, to his creditor, in security for a debt which was about to be placed in suit, and the insurance company paid the creditor about ten days before the debtor assigned in insolvency, it was held that this section could not apply. That the inability of the debtor to meet his engagements at the time of payment by the insurance company, or the knowledge of the creditor at that time was immaterial, there being nothing to show insolvency by the debtor at the time of the assignment of the policy (*McWhirter v. Thorne*, 19 C. P. U. C. 302).

A debtor, who is solvent, may pay any or all of his debts, although proceedings in bankruptcy are pending against him (re *Oregon Printing Company*, 13 B. R. 503).

Transactions between father and son are generally regarded with suspicion, but a transaction cannot be assumed fraudulent merely because the parties stand in that relation to each other. In one case it appeared that the assignment was made on the 10th of June, 1868. That on the 15th of April previous (over fifty days before the assignment) the insolvents had paid to their father two promissory notes, made by them in July and August, 1867, at three months for \$934. The father, in his examination, swore that these notes were given by the insolvents for their respective private debts, *bona fide* due to him for money lent and paid, and for board between 1863 and 1866, and that he had no knowledge of their business or inability to meet their engagements until the 27th of April, 1868, when he was asked by one of them for an advance of \$2,000, which he refused, not being satisfied with the statement of their affairs then produced to him. His statement was confirmed by the insolvents. The Court held that these payments to the father could not be held preferential or fraudulent (re *Wallis*, 29 Q. B. U. C. 313).

A payment by the sheriff, under a judgment of distribution, to an opposant therein collocated, at a time when such opposant was no longer possessed of his estate, having assigned the same under the Insolvent Act of 1869, is good and cannot be questioned subsequently by the assignee (*Sulvas v. Leveau*, 18 L. C. J. 293).

A payment made within thirty days preceding the execution of a deed of assignment, in discharge of a *capias* against the insolvent is not null unless it be proved that the creditor knew, or had probable reason to know, that the debtor was insolvent (*Larivière and Sauvageau*, 14 L. C. J. 139; 2 *Revue Legale*, 186).

135. Any transfer of a debt due by the insolvent, made within the time and under the circumstances, in the next preceding section mentioned, or at any time afterwards, whenever such demand shall have been followed by an assignment, or by the issue of such writ of attachment, to a debtor knowing

or having probable cause for believing the insolvent to be unable to meet his engagements, or in contemplation of his insolvency, for the purpose of enabling the debtor to set up by way of compensation or set-off the debt so transferred, is null and void, as regards the estate of the insolvent; and the debt due to the estate of the insolvent shall not be compensated or affected in any manner by a claim so acquired; but the purchaser thereof may rank on the estate in the place and stead of the original creditor.

It is clear that this section of the Act refers to the transfer of any debt which may, at the time any action is brought against a debtor of the estate, be set-off, whether such debt be payable at the time of such transfer or not, and it is equally clear that it is the debtor who is referred to as "knowing or having probable cause for believing the insolvent to be unable to meet his engagements, or in contemplation of his insolvency," and where a claim against an insolvent is purchased by a person who is indebted to the insolvent, for the purpose of set-off, it is his knowledge of the insolvent's being unable to meet his engagements, and his intention in purchasing, and not the knowledge or intention of the person selling or transferring the debt, which prevents the set-off from being available (*McLeod v. Domville*, 2 Pugsley, 422).

A note, made by the insolvent, and maturing on the 27th of November, was purchased on the 16th of November by a person who was indebted to the insolvent. The insolvent assigned on the 18th of November. The note at the time of the purchase was in the hands of the payee. It was held that it could not be set-off, and that it was the knowledge of the person purchasing which rendered the set-off unavailable (*ib.*).

A party acquiring a claim under the circumstances, and for the purpose mentioned in this section of the Act, cannot set it up by way of compensation or set-off, and the transfer of the debt is null and void as against the insolvent's estate. In such case compensation cannot be acquired under articles 1188 and 1196 of the Civil Code in Quebec, which provide that compensation takes place by the sole operation of law between debts which are equally liquidated and demandable, and have each for object a sum of money or a certain quantity of indeterminate things

of the same kind and quality (*Riddell v. Reay*, 18 L. C. J. 130).

136. Any person who, for himself or for any firm, partnership, or company, of which he forms part, or as the manager, trustee, agent or employee of any person, firm, co-partnership or company, purchases goods on credit, or procures any advance in money, or procures the indorsement or acceptance of any negotiable paper without consideration, or induces any person to become security for him, knowing or having probable cause for believing himself or such person, firm, co-partnership or company, for which he is acting, to be unable to meet his or its engagements, and concealing the fact from the person thereby becoming his creditor, with the intent to defraud such person, or who by any false pretence obtains a term of credit for the payment of any advance or loan of money, or of the price or any part of the price of any goods, wares or merchandise, with intent to defraud the person thereby becoming his creditor, or the creditor of such person, firm, co-partnership or company, and who shall not afterwards have paid or cause to be paid the debt or debts so incurred, shall be held to be guilty of a fraud, and shall be liable to imprisonment for such time as the Court may order, not exceeding two years, unless the debt and costs be sooner paid: Provided always, that in the suit or proceeding taken for the recovery of such debt or debts, the defendant be charged with such fraud, and be declared to be guilty of it by the judgment rendered in such suit or proceeding.

The 40 Vict. (s. 30) amended this section by adding after the words "knowing or," in the eighth line, the words "having probable cause for."

The Act of 1869 provided "and if such debt or debts be incurred by a partnership, then every member thereof who shall have known of the incurring, and of the intention to incur, such debt or debts, shall be similarly liable."

The Supreme Court of Nova Scotia held, in *Harrington v. Witter* (unreported; a copy of the demurrer-book and judgment having been kindly sent the author by N. H. Meagher, Esq., Barrister, Halifax), that it was sufficient in proceeding under this section to show that the defendant was a trader subject to the provisions of the Act, and that the word "person" did not necessarily mean an insolvent against whom a writ of attachment had issued or who had made an assignment. In other words a trader was held liable to be proceeded against under this section, although his estate was not in insolvency. The Court also ex-

pressed an opinion that under the words "manager, trustee, agent, or employee of any person, firm, co-partnership, or company," a mere workman for hire, being an employee of a company, might be proceeded against under this section.

It is impossible to indict a firm or corporation as such, and in the opinion of the writer these words were used to enable the Court to punish a firm or corporation through any of their representatives who were actually guilty of the fraud. It is only as the representative of the co-partnership or company that the manager, trustee, agent or employee can be proceeded against. The word "him" in the eighth line of this section, signifies "firm, partnership and company," or rather these words should be implied thereafter. In the eleventh line the words "or the creditor of such person, firm, co-partnership or company ought to follow the word "creditor." They are used further on in the section and are no doubt implied here.

The Court, in *Harrington v. Witter*, supra, seemed to be of opinion that this section applied to a person not a trader, and whose estate was not under adjustment in insolvency. The actual decision, however, was, that it was sufficient, in proceeding under this section, to show that the defendant was a trader. The writer entirely dissents from the opinion that a non-trader who is not acting as the mere representative of a trading firm or corporation, can be proceeded against under this section. He has very great doubts of the soundness of the decision in *Harrington v. Witter*: whether it would not be more in accordance with this section and the whole purview of the Act, to hold that the defendant must be an insolvent whose estate is being administered under the Act. Section 130 speaks of a debtor *afterwards becoming an insolvent*; section 132 contains no reference to subsequent proceedings in insolvency, and yet it is apprehended that the estate of the debtor must be in insolvency before this section could be invoked against him. Section 133 uses the words "any person," and it is clear that these words refer only to a person who afterwards becomes an insolvent under the Act, as the section empowers the *assignee* to recover the proceeds of the sale, deposit, pledge or transfer for the bene-



fit of the estate. Clearly this 136th section would apply if a trader contravened its provisions, and afterwards became an insolvent. The proviso, therefore, at the end of the section recognises the right to bring an action against an insolvent, notwithstanding his assignment, or the issue of a writ of attachment. This was also the ground taken by the Court in *Gault v. Lagarde* (Superior Court, Montreal, 1874, reported in Wotherpoon's Ins. Act, 194-5), where the Court held that a creditor might petition for the imprisonment of the insolvent under this section, even though he had filed a claim on his estate (see the cases already cited, *Squire v. Watt*, 29 Q. B. U. C. 328; re *Baker*, 3 Ch. Cham. 499; *Green v. Swan* 22 C. P. U. C. 307; *Prevost v. Drolet*, 18 L. C. J. 300).

"Court" in this section does not seem to mean the Insolvent Court, but the Court in which the action is brought for the recovery of the debt, and this section seems to sanction an action against an insolvent after his assignment, or the issue of a writ of attachment.

This section and the 137th section of the Act, being *quasi* penal, are to be strictly construed, and, to warrant imprisonment under their provisions, the case must be brought within the express words of the Act. It is clear that the defendant must be charged with the fraud in the suit or proceeding taken for the recovery of the debt or debts, and be declared guilty of it by the judgment rendered in such suit or proceeding. An action was brought in New Brunswick, under the Act of 1869, on a promissory note, made by defendant in favour of plaintiff, and the declaration alleged fraud and false pretences in obtaining credit, according to the 92nd section of the Act. Defendant pleaded the general issue, and gave notice of defence, denying the alleged fraud. He also filed an offer to suffer judgment by default, for amount of note, which offer plaintiff accepted, but no judgment was rendered declaring the defendant guilty of fraud. The Court held that this was not such a judgment by default as was contemplated by the 93rd section of the Act, the acceptance of defendant's offer having settled all the issues in the suit, and, there-

fore, no order for imprisonment could be made (*Jones v. Bejeau*, 1 Pugsley, 334; *Stephen's Digest*, N. B. Repts. 228).

Under this section, the delaration in the action to recover for the goods or money obtained should aver the fraud, bringing the case within the section, and after the defendant has been proved to be liable for the debt, then the plaintiff may ask that he may be declared to be guilty of fraud, under the Statute, and he may then be declared guilty if circumstances are shown justifying such judgment under the Statute. The averment of fraud within this section, when thus added to the declaration, cannot be pleaded or demurred to by the defendant. Thus, when a declaration, after declaring on two bills of exchange in separate counts, proceeded to aver that the debt for which the bills were given was contracted under circumstances which rendered the defendant liable to imprisonment under this section, and the defendant demurred to this averment, treating it as a third count, it was held that the averment was not the subject of either a plea or demurrer (*Rutherford v. Eakins*, 27 C. P. U. C. 55). This decision was pronounced on the authority of *Booth v. Taylor*, L. R. 1 Exch. 51).

In order that an insolvent may be guilty of fraud within the meaning of this section, two things must concur—first, the purchase must be made or advance obtained when he knew he was unable to meet his engagements; and, second, it must be shown that he concealed such inability from his creditor, with the intent of defrauding him. The mere fact of a trader purchasing goods who is at the time unable to meet his engagements is neither fraud nor within the provisions of the Insolvent Act. A purchase under such circumstances may be the very best and wisest act which the trader can do, and may also be the most beneficial act for his creditors (re *Garratt*, 28 Q. B. U. C. 266).

This section only applies when the insolvent obtains a term of credit, for the payment of an advance, &c., made by the person giving the credit. Where A. drew a bill of exchange upon B. for funds of A. in the hands of B., and before acceptance or payment of the bill, it was delivered to C., who became the holder, it was held not a fraud within this section, for B. to falsely pretend to C. on presentation of such bill for acceptance and payment, that

he had no funds of A.'s, and thereby obtain a further term for payment; and that C. could not, under such circumstances, maintain an action against B. for fraud under this section (*Jones v. Hanford*, 2 Pugsley, 467).

A person who buys goods on credit impliedly assures the vendor, if not of the actual sufficiency of his assets to meet his liabilities at least, that there is a reasonable probability of such sufficiency; and, while the vendor on credit takes the risk of the subsequent insolvency of his debtor, he is not supposed to contemplate the escape or the bankruptcy of his debtor, by reason of a state of insolvency, actually existing at the time of the purchase. Where, therefore, a party buys goods on credit, knowing his affairs to be in a bad state, although he may have no intention of defrauding the vendor, yet in the eye of the law he does a wrong, and if he subsequently goes into insolvency, the Court will be justified in suspending his discharge for a period, under its discretionary power (*ex parte Tempest*, 11 L. C. J. 57; 2 L. C. L. J. 276).

In order that the transactions may fall within this section, it must appear that the party was insolvent, and that he was aware of the fact, and made the purchase in contemplation of insolvency (*ex parte Thurber*, 11 L. C. J. 35).

The insolvent commenced business in the year 1855, in Belleville, and in the fall of 1857 he bought goods from different persons to the extent of about \$6,000. He was insolvent then, but did not know it. In the spring of 1858, he took stock, and found he was insolvent. His stock then amounted to \$3,225, and in March, 1858, he sold to his brother for fifteen shillings in the pound, and took his notes for the amount. These notes were sent to his creditors, and were afterwards paid. The insolvent ran away to the United States immediately after he sold out to his brother, and returned to this country in 1862. He then assigned to his brother, for the benefit of his estate, his accounts and notes, amounting to \$2,697. It was held that these facts did not show that the insolvent purchased goods on credit with intent to defraud, within the meaning of this section; that, though these acts were unfavourable to the insolvent, they were distinguishable

from acts or other misconduct constituting fraud, and that unless the latter was shown, the insolvent was entitled to the benefit of the Statute (re *Smith*, 4 U. C. P. R. 89; 3 U. C. L. J. N. S. 153).

Under this section the intent to defraud seems to be a material and substantial ingredient in the transaction. It will not be sufficient that the person is in difficulties when the goods are purchased, or advances procured. If the person has a reasonable expectation of being able to meet his liabilities, the transaction will not be fraudulent. On the other hand, if the expectation is unreasonable or improbable, the transaction may be impeached; and in determining the reasonableness of the expectation, the grounds on which it is based must always be looked to. Where a person in business finds himself unable to pay twenty shillings in the pound, it may or may not be his duty to discontinue his trade. Whether incurring fresh liabilities to continue his business will be fraudulent or not, depends upon the probability of these liabilities being wiped off. The liabilities may be so large, and the assets so small, and the business so situate, that to continue it will be a fraud. In all cases, the grounds on which the trader's conclusion is honestly based must be taken into consideration, as above explained. Thus, where a trader, after discovering that his affairs were not in a position to pay twenty shillings in the pound, continued his business in the hope which was not shown to be absurd or unreasonable, that he would hereby be able to pay all his debts in full and meet all his engagements, and in the course of the business so continued contracted some new debts, but ultimately failed in meeting his liabilities, and made an assignment in insolvency, it was held that he was not thereby disentitled to his discharge (re *Holt*, 13 Grant, 168).

The mere endorsement of renewal notes by a person in insolvent circumstances, where no money is advanced on the renewal, is not a violation of this section; but if there was any false pretence, it might amount to obtaining a term of credit for the payment of an advance within the meaning of the section (re *Jones*, 4 U. C. P. R. 317).

A trader who was heavily indebted, and whose entire real pro-

perty was mortgaged to various creditors for its full value, or more than its full value, obtained credit from Montreal merchants when he knew or believed himself to be unable to meet his engagements, concealing this fact from them and falsely alleging that he was worth \$4,000 more than he owed, this was held to be such a fraud as disentitled him to his discharge under the Act (re *Owens*, 12 Grant, 560).

The 92nd section of the Act of 1869 used the words "unless the debt or costs be sooner paid." The present Act substitutes "and" for "or," in the Act of 1869. The necessity for this change is shown by the following cases.

In *Rogers v. Sancer*, (18 L. C. J. 57), the Court held that the words "unless the debt or costs be sooner paid," in the Act of 1869, should be read, "unless the debt and costs" be sooner paid, and where the Court was satisfied that the fraud charged in an action, under this section, had been proved, the insolvent was ordered to be imprisoned, in default of payment of costs, as well as of the debt.

In a subsequent case, however, it was held, that in ordering imprisonment, under this section, the Court is bound to limit the payment, by way of release, to the debt or costs, and that they could not order the payment of both (*Warner v. Buss*, 18 L. C. J. 184).

137. Whether the defendant in any such case appear and plead, or make default, the plaintiff shall be bound to prove the fraud charged, and upon his proving it, if the trial be before a jury, the judge who tries the suit or proceeding shall immediately after the verdict rendered against the defendant for such fraud (if such verdict is given), or if not before a jury, then immediately upon his rendering his judgment in the premises, adjudge the term of imprisonment which the defendant shall undergo; and he shall forthwith order and direct the defendant to be taken into custody and imprisoned accordingly; but such judgment shall be subject to the ordinary remedies for the revision thereof, or of any proceeding in the case.

This provision, rendering the judgment subject to the ordinary remedies for revision, is most important, if the decision in *Rutherford v. Eakins* (27 C. P. U. C. 55) is correct, as, in that case, the only remedy open to the defendant would seem to be a motion in arrest of judgment.

## OFFENCES AND PENALTIES.

138. Every assignee, to whom an assignment is made under this Act, is an agent within the meaning of the seventy-sixth and following sections of the "Act respecting larceny and other similar offences," and every provision of this Act, or resolution of the creditors, relating to the duties of an assignee, shall be held to be a direction in writing, within the meaning of the said seventy-sixth section; and in an indictment against an assignee, under any of the said sections, the right of property in any moneys, security, matter or thing, may be laid in "the creditors of the insolvent (*naming him,*) under the Insolvent Act of 1875," or in the name of any assignee subsequently appointed, in his quality of such assignee.

The Act referred to is the Statute of Canada, 32 & 33 Vict. chap. 21. This Statute provides as follows:—

*As to frauds by agents, bankers, or factors.*

76. Whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay or deliver such money or security or any part thereof respectively, or the proceeds, or any part of the proceeds of such security for any purpose, or to any person specified in such direction, in violation of good faith, and contrary to the terms of such direction, in anywise converts to his own use or benefit, or the use or benefit of any person other than the person by whom he has been so intrusted, such money, security, or proceeds, or any part thereof respectively, and whosoever, having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom, or any part thereof, or of this Dominion of Canada, or any Province thereof, or of any British Colony or Possession, or of any foreign state, or in any stock or fund of any body corporate, company or society, for safe custody or for any special purpose without any authority to sell, negotiate, transfer or pledge, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or

power of attorney has been intrusted to him, sells, negotiates, transfers, pledges, or in any manner converts to his own use or benefit, or the use or benefit of any person other than the person by whom he has been so intrusted, such chattel, or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney relates, or any part thereof, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement; but nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever, or any mortgagee of any property, real or personal, in respect to any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney or other agent from receiving any money due or to become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this Act had not been passed; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he has any lien, claim, or demand, entitling him by law so to do, unless such sale, transfer or other disposal extends to a greater number or part of such securities or effects than are requisite for satisfying such lien, claim or demand.

The prisoner, a stock and share dealer, was employed by the prosecutrix to purchase securities for her. He bought in his own name and received money from her from time to time to cover the amounts he had paid or had to pay for the securities. Such payments were not made against any particular item, but in cheques for round sums. On one occasion he wrote to her, "I inclose a contract note for £300 J. bonds at 112, £336." And the contract ran "sold to Mrs. S. (the prosecutrix) £300, J. at 112 £336;" and was signed by the prisoner. The prosecutrix wrote in reply, "I have just received your note and contract note for three J. shares and inclose

a cheque for £336 in payment." The prisoner never paid for the bonds, but in violation of good faith appropriated to his own use the proceeds of the cheque. It was held that the letter of the prosecutrix was a direction in writing to apply the proceeds of the cheque to pay for the bonds if they had still to be paid for, within the meaning of the corresponding section of the English Act, 24 and 25 Vict. chap. 96 (*Reg. v. Christian*, L. R. 2 C. C. R. 94).

It is necessary that there should be a direction in writing under the first branch of this section.

The defendant, an attorney, was employed to raise a loan of money on mortgage, of which he was to apply a part in paying off an earlier mortgage and to hand over the rest to the mortgagor. He prepared the mortgage-deed, received the mortgage money and handed over the deed to the mortgagee in exchange. He then misappropriated a part of the money to his own use. It was held that the prisoner could not be convicted under the first branch of the section for want of a direction in writing, and also that the case was not within the second branch of the section (*Reg. v. Cooper*, L. R. 2 C. C. R. 123).

The second branch of the section seems to apply to cases where the party deals with the securities without authority and contrary to the purpose for which they were entrusted, and where the security, etc., is used for the purpose for which it is entrusted, the charge cannot be sustained, unless, perhaps, in a case where it is shown that the prisoner at the time of receiving the security intended to convert it to his own use. The prisoner was an insurance broker and had as such effected insurances on a ship for the prosecutor; and the ship having been lost, the prosecutor sent him the policies, three in number, one with the A. office, one with the J. office, and one with the underwriters, with other documents necessary for recovering the loss. On the 17th December, the prisoner received the amount of the J. office's policy, and on the 31st December, the amount of the A. office's policy. Each amount was paid him by a cheque to his own order, which in each case he paid into his own bank to his own credit. The prisoner did not pay over to the prosecutor any of the money so received by him, but being pressed for it gave various excuses for not doing so. On the 27th January



following, he filed a petition for liquidation, and his balance at his bank was then much less than the sum received on the policies; it was held that the prisoner could not be convicted, it appearing that by the understanding between the parties the prisoner was not to hand it over at once to his principal, but to carry it to an account between them, and to pay it only in settlement of the account (*Reg. v. Tatlock*, 1. R. 2 Q. B. D. 157).

77. Whosoever, being a banker, merchant, broker, attorney, or agent, and being intrusted, either solely, or jointly with any other person, with the property of any other person for safe custody, with intent to defraud, sells, negotiates, transfers, pledges, or in any other manner converts or appropriates the same or part thereof, to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, is guilty of a misdemeanor, and shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned.

78. Whosoever, being intrusted, either solely, or jointly with any other person, with any power of attorney, for the sale or transfer of any property, fraudulently sells or transfers, or otherwise converts the same or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, is guilty of a misdemeanor, and shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned.

79. Whosoever, being a factor or agent intrusted either solely or jointly with any other person, for the purpose of sale or otherwise, with the possession of any goods, or of any document of title to goods, contrary to or without the authority of his principal in that behalf, for his own use or benefit, or the use or benefit of any person, other than the person by whom he was so intrusted, and in violation of good faith, makes any consignment, deposit, transfer or delivery, of any goods or document of title so intrusted to him as in this section before mentioned, as and by way of a pledge, lien or security for any money or valuable security, borrowed or received by such factor or agent at or before the time of making such consignment, deposit, transfer or delivery, or intended to be thereafter borrowed or received, or contrary to, or without

such authority, for his own use or benefit, or the use or benefit of any person, other than the person by whom he was so intrusted, and in violation of good faith, accepts any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer or delivery of any such goods, or document of title, is guilty of a misdemeanor, and shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned; and every clerk or other person who knowingly and wilfully acts and assists in making any such consignment, deposit, transfer or delivery, or in accepting or procuring such advance as aforesaid, is guilty of a misdemeanor, and shall be liable to any of the same punishments; provided, that no such factor or agent shall be liable to any prosecution for consigning, depositing, transferring or delivering any such goods or documents of title, in case the same are not made a security for, or subject to the payment of any greater sum of money than the amount, which at the time of such consignment, deposit, transfer or delivery, was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal, and accepted by such factor or agent.

80. Any factor or agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such factor or agent having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed to have been intrusted with the possession of the goods represented by such document of title; and every contract pledging or giving a lien upon such document of title as aforesaid, shall be deemed to be a pledge of and lien upon the goods to which the same relates; and such factor or agent shall be deemed to be possessed of such goods or document, whether the same are in his actual custody or held by any other person subject to his control, or for him, or on his behalf; and where any loan or advance is bona fide made to any factor or agent intrusted with and in possession of any such goods or document of title, on the faith of any contract or agreement in writing to consign, deposit, transfer or deliver such goods

or document of title, and such goods or document of title is or are actually received by the person making such loan or advance, without notice that such factor or agent was not authorized to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or document of title, within the meaning of the last preceding section, though such goods or document of title are not actually received by the person making such loan or advance till a period subsequent thereto; and any contract or agreement whether made direct with such factor or agent, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such factor or agent; and any payment made, whether by money or bill of exchange or other negotiable security, shall be deemed to be an advance within the meaning of the last preceding section; and a factor or agent in possession as aforesaid, of such goods or document, shall be taken for the purpose of the last preceding section, to have been intrusted therewith by the owner thereof, unless the contrary be shown in evidence.

81. Whosoever, being a trustee of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, with intent to defraud, converts or appropriates the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise disposes of or destroys such property or any part thereof, is guilty of a misdemeanor, and shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned; provided that no proceeding or prosecution for any offence included in this section shall be commenced without the sanction of the Attorney-General, or Solicitor-General for that Province in which the same is to be instituted; provided also, that when any civil proceeding has been taken against any person to whom the provisions of this section may apply, no person who has taken such civil proceeding shall commence any prosecution under this section without the sanction of the Court or judge before whom such civil proceeding has been had or is pending.

82. Whosoever, being a director, member, manager or public officer of any body corporate or public company, fraudulently takes or applies for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company, is guilty of a misdemeanor, and shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned.

83. Whosoever, being a director, member, manager or public officer of any body corporate or public company, as such receives or possesses himself of any of the property of such body corporate or public company, otherwise than in payment of a just debt or demand, and with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof in the books and accounts of such body corporate or public company, is guilty of a misdemeanor, and shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned.

84. Whosoever, being a director, manager, public officer or member of any body corporate or public company, with intent to defraud, destroys, alters, mutilates or falsifies any book, paper writing or valuable security belonging to the body corporate or public company, or makes or concurs in the making of any false entry, or omits, or concurs in omitting any material particular in any book of account or document, is guilty of a misdemeanor, and shall be liable to any of the punishments which the Court may award as hereinbefore last mentioned.

85. Whosoever, being a director, manager, or public officer or member of any body corporate or public company, makes, circulates or publishes, or concurs in making, circulating or publishing any written statement or account which he knows to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, is guilty of a misdemeanor, and shall be

liable to any of the punishments which the Court may award as hereinbefore last mentioned.

86. Nothing in any of the last ten preceding sections of this Act contained, shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any Court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in the said sections mentioned, by any evidence whatever, in respect of any act done by him, if, at any time previously to his being charged with such offence, he has first disclosed such act on oath, in consequence of any compulsory process of any Court of law or equity, in any action, suit or proceeding, bona fide instituted by any party aggrieved, or if he has first disclosed the same in any compulsory examination or deposition before any Court, upon the hearing of any matter in bankruptcy or insolvency.

87. Nothing in the last eleven preceding sections of this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon against any person under any of the said sections shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any offence against any of the said sections might have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him; and nothing in the said sections contained shall affect or prejudice any agreement entered into, or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated.

139. Any assignee who in any certificate required by this Act shall wilfully misstate or falsely represent any material fact for the purpose of deceiving the judge, the creditors, or the inspectors, shall be guilty of a misdemeanor, and shall be liable at the discretion of the Court before which he shall be convicted to imprisonment for a term not exceeding three years.

140. From and after the coming into force of this Act, any Insolvent who, with regard to his estate,—or any president, director, manager or employee

of any co-partnership, or of any incorporated company not specially excepted in the first section of this Act, with regard to the estate of such co-partnership or company, who shall do any of the acts or things following with intent to defraud or defeat the rights of his or its creditors, shall be guilty of a misdemeanor, and shall be liable, at the discretion of the court before which he is convicted, to punishment by imprisonment for not more than three years, or to any greater punishment attached to the offence by any existing Statute :—

If he does not upon examination fully and truly discover, to the best of his knowledge and belief, all his property real and personal, inclusive of his rights and credits, and how and to whom, and for what consideration, and when he disposed of, assigned or transferred the same or any part thereof, except such part has been really and *bona fide* before sold or disposed of in the way of his trade or business, or laid out in ordinary family or household expenses, and fully, clearly and truly state the causes to which his insolvency is owing ; or shall not deliver up to the Assignee all such part thereof as is in his possession, custody or power (except such part thereof as is exempt from seizure as hereinbefore provided), and also all books, papers and writings in his possession, custody or power relating to his property or affairs ;

If, within thirty days prior to the demand of assignment, or the issue of a writ of attachment under this Act, he doth, with intent to defraud his creditors, remove, conceal or embezzle any part of his property, to the value of fifty dollars or upwards ;

If, in case of any person having to his knowledge or belief proved a false debt against his estate, he fail to disclose the same to his Assignee within one month after coming to the knowledge or belief thereof ;

If, with intent to defraud, he wilfully and fraudulently omits from his schedule any effects or property whatsoever ;

If, with intent to conceal the state of his affairs, or to defeat the object of this Act or of any part thereof, he conceals, or prevents, or withholds the production of any book, deed, paper or writing relating to his property, dealings or affairs ;

If, with intent to conceal the state of his affairs or to defeat the object of the present Act or of any part thereof, he parts with, conceals, destroys, alters, mutilates or falsifies, or causes to be concealed, destroyed, altered, mutilated or falsified, any book, paper, writing or security or document relating to his property, trade dealings or affairs, or makes or is privy to the making of any false or fraudulent entry or statement in or omission from any book, paper, document or writing relating thereto ;

If, at his examination at any time, or at any meeting of his creditors held under this Act, he attempts to account for the non-production or absence of any of his property by fictitious losses or expenses ;

If, within the three months next preceding the demand of assignment, or

the issue of a writ of attachment in liquidation, he pawns, pledges or disposes of, otherwise than in the ordinary way of his trade, any property, goods or effects, the price of which remains unpaid by him during such three months.

The last clause of this section differs from clause 8 of section 147 of the Act of 1869. That, in the former, the words, "demand of assignment," are substituted for "execution of a deed of assignment"—voluntary assignments being abolished by the last Act. An insolvent may be guilty of an offence, under this section, although the goods are not disposed of to his own use, but to satisfy creditors; and although the term of credit thereon has not expired at the time of the demand of assignment, or the issue of the writ of attachment. The prisoners were indicted, under the 147th section of the Act of 1869, for having, within three months preceding the execution of an assignment in insolvency, pawned, pledged, and disposed of, otherwise than in the way of trade, certain goods, which had remained unpaid for, during the said three months. The goods which had been purchased on credit, the period of which had not expired, when the prisoners were indicted, were given on the day of assignment, but before its execution, to a clerk on account of salary due him, and to indemnify him against accommodation indorsements, to a carter in their employment, in satisfaction of a sum of money previously deposited with them, and to a person who had given them accommodation notes. The indictment was found on the 23rd of October, but the information had been laid and the prisoners arrested before the first of September, when the Insolvent Act of 1875 came into force. The disposal, under these circumstances, was held an offence, under section 147 of the Act of 1869, and that the time of credit expired by the effect of the assignment (*Reg. v. Kerr*, 26 C. P. U. C. 214)

It is necessary that the goods, &c., removed, should be the property of the insolvent at the time the alleged offence is committed. Where the debtor had executed a bill of sale of the goods, which was void, against the assignee in insolvency, for want of registration, it was held that he was not liable for removal of the goods comprised in the bill of sale, for the property therein had, on execution, passed to the bargainee, and the fact that the

assignee in insolvency was entitled, as against the bargainee, did not alter the case (*Reg. v. Creese*, L. R. 2 C. C. R. 105 ; 29 L. T. N. S. 897). The fraud contemplated under this section, is active fraud, such as a false representation (ex parte *Brett*, L. R. 1 Ch. D. 151).

Where a trader obtained goods on credit, and soon after, by bill of sale, assigned them and other goods to his sister, to secure an antecedent debt, it seems the case would come within this clause (*Reg. v. Thomas*, 22 L. T. N. S. 138). But where the goods were bought by the bankrupt on credit in the ordinary course of dealing, and exported, and money was raised by him on the bill of lading, this was held not to be within the corresponding section of the English Act (ex parte *Brett*, 24 W. R. 101).

It would seem that the latter part of this clause was intended to punish frauds on the creditors generally, and not on the particular creditor who sold the goods, though if the goods were obtained upon credit with the intent of disposing of them to raise money the fraud on the seller would be the most obvious one (*U. S. v. Penn*, 13 B. R. 464). The making of a fraudulent chattel mortgage renders a party liable under this provision (*U. S. v. Bayer*, 13 B. R. 88). It is not necessary that the goods which have been disposed of should have been obtained within three months prior to the assignment (*U. S. v. Smith*, 13 B. R. 61).

141. Every offence punishable under this Act shall be tried as other offences of the same degree are triable in the Province where such offence is committed.

The 148th section of the Act of 1869 required that the jury should be a special jury, to obtain which the proceedings necessary in a civil case had to be adopted (see notes to section 149).

142. If any creditor of an insolvent, directly or indirectly, takes or receives from such insolvent, any payment, gift, gratuity, or preference, or any promise of payment, gift, gratuity, or preference, as a consideration or inducement to consent to the discharge of such insolvent, or to execute a deed of composition and discharge with him ; or if any creditor knowingly ranks upon the estate of the insolvent for a sum of money not due to him by the insolvent, or by his estate, such creditor shall forfeit and pay a sum equal to



treble the value of the payment, gift, gratuity, or preference so taken, received, or promised, or treble the amount improperly ranked for, as the case may be, and the same shall be recoverable by the assignee for the benefit of the estate, by suit in any competent Court, and when recovered, shall be distributed as part of the ordinary assets of the estate.

(See sections 66 and 87, and notes thereon).

143. If, after a demand is made for the issue of a writ of attachment in insolvency, or for an assignment of his estate under this Act, as the case may be, when such demand shall be followed by the issue of a writ of attachment or by an assignment under this Act, the insolvent retains or receives any portion of his estate or effects, or of his moneys, securities for money, business papers, documents, books of account, or evidences of debt, or any sum or sums of money, belonging or due to him, and retains and withholds from his assignee, without lawful right, such portion of his estate or effects, or of his moneys, securities for money, business papers, documents, books of account, evidences of debt, sum or sums of money, the assignee may make application to the judge, by summary petition, and after due notice to the insolvent, for an order for the delivery over to him of the effects, documents, or moneys so retained; and in default of such delivery in conformity with any order to be made by the judge upon such application, such insolvent may be imprisoned in the common gaol for such time not exceeding one year, as such judge may order.

The assignment, or the issue of the writ of attachment, in compulsory liquidation, vests in the assignee or guardian the whole of the estate and effects of the insolvent, and the latter has no right to retain or withhold from the assignee after the date of the assignment, or the issue of the writ, any part of such estate or effects, even though the same is retained without fraud, and to meet the personal expenses of the insolvent. The latter has no right to retain them for any purpose (*ex parte Tempest*, 11 L. C. J. 5; see also section 134, and notes thereon).

Prior to the passing of the Act of 1869, it was held that where an insolvent received a sum of money belonging to the estate, during the time which intervened between the date of the notice of the meeting of creditors, and the appointment of the assignee, and refused to pay over the money to the assignee, this was a "retaining and withholding without lawful right," within the meaning of the 29 Vict. chap. 18, s. 29 (*re Warington*, 12 L. C. J. 237).

An insolvent cannot legally be committed under this section without an opportunity of showing cause, and it should appear in the order of committal, that he has had notice of the order for delivery, &c., for non-compliance with which an order of committal is asked (re *Hicks*, 5 U. C. P. R. 88; 5 U. C. L. J. N. S. 180).

144. The deeds of assignment and of transfer, or in the Province of Quebec authentic copies thereof, or a duly authenticated copy of the record of the appointment of the assignee certified by the clerk or prothonotary of the Court in which such record is deposited, under the seal of such Court, shall be prima facie evidence in all Courts, whether civil or criminal, of such appointment, and of the regularity of all proceedings at the time thereof, and antecedent thereto.

#### BUILDING AND JURY FUND.

145. One per centum upon all moneys proceeding from the sale by an assignee, under the provisions of this Act, of any immovable property in the Province of Quebec, shall be retained by the assignee out of such moneys, and shall, by such assignee, be paid over to the sheriff of the district, or of either of the Counties of Gaspe or Bonaventure, as the case may be, within which the immovable property sold shall be situate, to form part of the building and jury fund of such district or county.

146. The Governor in Council shall have all the powers with respect to imposing a tax or duty upon proceedings under this Act, [which are conferred upon the Governor in Council by the thirty-second and thirty-third sections of the one hundred and ninth chapter of the Consolidated Statutes for Lower Canada, and by the Act intituled "An Act to make provision for the erection or repair of Court Houses and Gaols at certain places in Lower Canada" (12 Vict. chap. 112).

#### PROCEDURE IN THE CASE OF INCORPORATED COMPANIES.

147. The provisions of this Act shall apply to the estates of incorporated companies, not specially excepted in the first section of this Act, subject to the following modifications :—

(1.) No writ of attachment shall issue against the estate of an incorporated company except upon the order of the judge, and after notice of at least forty-eight hours has been given to such company of the application for such writ. The judge in all cases where proceedings have been adopted under this Act against an incorporated company, may, before granting a writ of attachment, order the official assignee to inquire into the affairs of the company,

and to report thereon within a period not exceeding ten days from the date of such order :

(2.) Upon such order it shall be the duty of such company, and of the president, directors, managers and employees thereof, and of every other person having possession or knowledge thereof, to exhibit to the official assignee, or to his deputy, the books of account, together with all inventories, papers, and vouchers referring to the business of the company, or of any other person : and generally to give all such information as may be required by the official assignee to form a just estimate of the affairs of the said company ; and any refusal on the part of the said president, directors, managers or employees of the company to give such information shall, on evidence of such refusal, be considered as a contempt of an order of the Court or judge, and punishable by fine or imprisonment or by both at the discretion of the judge :

(3.) From the time the above order is served upon the company, the president, directors, managers and employees thereof, and all other persons having the control or possession of its affairs or property, shall hold the estate and property of the said company upon trust for the creditors of the said company, and shall be bound to account for all the property of the said company under the same obligations, liabilities, and responsibilities as trustees appointed by courts of law or equity in the several Provinces, or as guardians and sequestrators in the Province of Quebec, are bound :

(4.) Upon the report of the Official Assignee or before any order is given for the examination into the affairs of the company, as herein provided, the judge may order that a meeting of the creditors be called and held in the manner provided for by this Act for the first meeting of creditors, at which meeting the creditors present in person or represented by proxy who shall verify their claims under oath, may pass such resolutions either for the winding up of the affairs of the company or for allowing the business thereof to be carried on as they may deem most advantageous to the creditors ; and may also appoint two inspectors and indicate the mode in which the business of the company should be wound up or should be continued (39 Vict. chap. 30, s. 17) :

(5.) The resolutions so adopted shall be submitted to the judge at the time and place appointed at the meeting, and at least forty-eight hours' notice shall be given by the official assignee to the company of the time and place so fixed :

(6.) The judge, after hearing such creditors as may be present, the assignee and the company, may confirm, reject, or modify the said resolutions ; and he may order the immediate issue of a writ of attachment to attach the estate of the company, or direct that the issue of such writ shall be suspended for a period not exceeding six months ; during which period he may order that the official assignee or the inspectors (if any have been appointed by the creditors) shall exercise a general supervision over the estate and business of

the said company by requiring from the president, directors, managers and employees of the company, such periodical accounts and statements, of the business done, and of the moneys received and expended or disbursed since the last statement as may be required by the said inspectors or the said official assignee to obtain a proper knowledge of the affairs of the company :

(7.) The judge may also, if he deems it for the advantage of the creditors, appoint a receiver charged with such duties as to the superintendence or management of the affairs of the company as may be imposed upon him by the order of the judge ; and who shall also assume and be invested with all the powers vested in the directors and stockholders respecting the calling in and collecting of the unpaid stock of the company, and subject to such orders and directions as he may, from time to time, receive from the judge :

(8.) Such receiver shall account, whenever ordered by the Court or judge, for all moneys or property he may have received from the estate :

(9.) Before the expiration of the six months next after such order the official assignee or the receiver, as the case may be, shall cause another meeting of the creditors to be called :

(10.) On the resolutions adopted at such meeting the judge may either grant a further delay not exceeding six months, or cause a writ of attachment to issue at the instance of any creditor or creditors :

(11.) If, at the expiration of such prolonged delay, the demands made upon the company to place it in liquidation have not been satisfied, the judge shall order the issue of a writ of attachment ; and the estate of the said company shall be wound up under the provisions of this Act, unless the creditor or creditors entitled to such writ shall consent to a further delay :

(12.) Nothing in this section shall prevent the judge before the expiration of the delays he may have granted under the preceding sub-sections, from cancelling the orders so given by him, and from ordering the issue of a writ of attachment or from releasing the company from the effect of any such order, as circumstances may require :

(13.) The president, directors, managers, or other officers or employees of the company, and any other person, may be examined by the assignee or by the judge on the affairs of the company, and each of them shall, for refusal to answer questions put in reference to the business within his own cognizance, be liable to the same penalties as ordinary traders refusing to answer questions put under the provisions of this Act :

(14.) The remuneration of the official assignee and of the receiver for services performed under the preceding sub-sections shall be fixed by the judge.

(15.) Nothing in the preceding sub-sections shall prevent the president, directors, managers, or employees of the company, on being duly authorized to that effect, from making an assignment of the estate of such company to an official assignee in the form provided for by this Act, before the expiration of

the delays which may have been granted to such company by the Court or judge.

#### GENERAL PROVISIONS.

148. The foregoing provisions of this Act shall come into force and take effect upon, from and after the first day of September, in the present year 1875, and not before, except in so far as relates to the appointment of official assignees, and the making and framing of rules, orders, and forms, to be followed and observed in proceedings under this Act, with respect to which the said provisions shall be in force from the time of the passing of this Act.

149. "The Insolvent Act of 1864," and the Act to amend the same passed by the Parliament of the late Province of Canada, in the twenty-ninth year of Her Majesty's reign, "The Insolvent Act of 1869," the Act amending the same passed in the thirty-third year of Her Majesty's reign, and the Act amending the same passed in the thirty-fourth year of Her Majesty's reign, and the Act passed in the thirty-seventh year of Her Majesty's reign continuing the same, the Act passed by the Legislature of Prince Edward Island in the thirty-first year of Her Majesty's reign, chaptered fifteen, intituled, "An Act for the relief of unfortunate debtors," and the several Acts amending and continuing the same which are in force in the said Province of Prince Edward Island, which are mentioned in and continued by the last mentioned Act passed in the thirty-seventh year of Her Majesty's reign, the Act of the Legislature of the Colony of Vancouver Island, passed in the year 1862, and intituled: "An Act to declare the law relative to Bankruptcy and Insolvency in Vancouver Island and its dependencies," and the Act of the Legislature of the Colony of British Columbia, passed in the year 1865, and intituled: "An Ordinance to amend the law relative to Bankruptcy and Insolvency in British Columbia," and all Acts of the said Legislatures, or either of them, amending the same, are hereby continued in force to the first day of September in the present year 1875, after which date the same shall be repealed, except so far as regards proceedings commenced and then pending thereunder, and also as regards all contracts, acts, matters and things made and done before such repeal, to which the said Acts or any of the provisions thereof would have applied if not so repealed, and especially such as are contrary to the provisions of the said Acts, having reference to fraud and fraudulent preferences, and to the enregistration of marriage contracts within the Province of Quebec; and as to all such contracts, acts, matters and things, the provisions of the said Acts shall remain in force, and shall be acted upon as if this Act had never been passed: Provided always, that as respects matters of procedure merely, the provisions of this Act shall, upon and after the said first day of September, in the present year 1875, supersede those of the said Acts even in cases commenced and then pending, except cases pending before any

official assignee, in his judicial capacity : And all securities given under the said Acts shall remain valid, and may be enforced, in respect of all matters and things falling within their terms, whether on, before or after the day last aforesaid ; and especially all securities theretofore given by official assignees shall serve and avail hereafter as if given under this Act. All other Acts and parts of Acts now in force in any of the Provinces to which this Act applies, which are inconsistent with the provisions of this Act, are hereby repealed.

The Act of 1864 was not confined to traders. An assignment was made under the Act, in March, 1869, by an inn-keeper who, according to the law in Ontario at that time, was not a trader. The Act of 1869 was passed on the 22nd of June, 1869, but the discharge of the insolvent was not obtained until November, 1870, and was entitled " Insolvent Act of 1869." An execution was issued against the insolvent, on a debt contracted before the assignment, and it was held that as the insolvency proceedings were commenced, under the Act of 1864, they must all be considered as taken under that Act, the procedure merely being regulated by the Act of 1869, and as the defendant could avail himself of the provisions of the Act of 1864, the execution was set aside (*Carnegie v. Tuer*, 10 C. L. J. N. S. 196 ; 6 P. R. U. C. 165).

Where goods were disposed of, contrary to clause 8 of section, 147 of the Act of 1869 before the 1st of September, 1875, and an information therefor was laid prior to the coming into force of the present Act, on 1st September, 1875, though the indictment was not found until the 23rd of October following, it was held that the prosecution as well as the offence came within this saving clause, the laying of the information being the commencement of the prosecution. Section 148 of the Act of 1869 provided that all offences punishable under that Act should be tried by a special jury, and section 141 of the present Act directs that all offences punishable under the Act shall be tried as other offences of the same degree, and by the proviso in this section, as respects matters of procedure, the provisions of the present Act supersede those of the Act of 1869, even in cases commenced and pending. Where, therefore, before the trial for misdemeanor, under section 147 of the Act of 1869, the Crown gave notice of, and struck, a

special jury, pursuant to section 148 of that Act, and the special jury were in attendance at the trial, but the Crown, notwithstanding, elected to call and try the case by a common jury, the prisoners' counsel objected thereto, and the case proceeded, the prisoners entering into full defence, but subject to such objection, which was renewed at the close of the case with the further objection that there had been a mis-trial. It was held that the case should have been tried by a special jury, for the offence was not punishable under the Act of 1875, and the matter was not one of procedure within this section. That there had, therefore, been a mis-trial, which the prisoners, under the circumstances, had not waived their right to insist upon, and that this was a "question of law which arose on the trial," which might properly be reserved, and not an objection to be raised by challenge to the jury (*Reg. v. Kerr*, 26 C. P. U. C. 214).

150. The foregoing provisions of this Act shall apply to each and every the Provinces in the Dominion of Canada.

151. The provisions of "The Insolvent Act of 1869," applied by Schedule A of the Act thirty-fourth Victoria, chapter thirteen, to insolvents resident in the Province of Manitoba, shall continue to apply to such insolvents, in the case of composition and discharge mentioned in the said provisions, until the said first day of September, 1875, until which day the said provisions are hereby continued in force for that purpose; and upon, from, and after the said day the same shall be repealed, subject to the like exceptions and provisions as are made in the next preceding section but one, as to the Acts and laws repealed by the said section; and in the provisions so continued in force "the Court" shall mean the Court of Queen's Bench of Manitoba, and "the judge" shall mean the chief justice or one of the puisne judges of the said Court.

152. This Act shall be known and may be cited as "The Insolvent Act of 1875."

### 39 VICT. CHAP. 30.

#### AN ACT TO AMEND "THE INSOLVENT ACT OF 1875."

[Assented to 12th April, 1876.]

WHEREAS it is expedient to make certain amendments in "*The Insolvent Act of 1875*": Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Sub-section *b* of the second section of the said Act is hereby amended by adding after the words "and if no such Gazette is published," the words following: "or if such Gazette is not, in the opinion of the Court or judge, published with sufficient frequency to enable the required notice to be conveniently published therein."

2. The fourth section of the said Act is hereby amended by adding after the word "original" in the third line from the end, the word "affidavit."

3. The fourteenth section of the said Act is hereby amended by striking out the words "or against whom a writ of attachment has issued as provided by this Act," in the second, third, and fourth lines, and the words "or writ of attachment" in the twelfth line; and by striking out the words "or by section nine" in the fifteenth line; and the words "or who issued the writ of attachment" in the nineteenth and twentieth lines; and the eighteenth section of the said Act is hereby amended by inserting after the word "liquidation" in the ninth line, the following words "or for want of, or for a substantial insufficiency in the affidavits required by section nine."

4. The twentieth section of the said Act is hereby amended by striking out the word "twice" in the third line from the end thereof, and inserting in lieu thereof the word "once," and by inserting after the word "Gazette" in the same line, the words following, "and once in one local or the nearest published newspaper."

5. The twenty-sixth section of the said Act is hereby amended by inserting after the word "answer" in the fifth line thereof, the words "upon oath," and by striking out the word "and" in the eighth line, and inserting in lieu thereof the words "or to be sworn, or"

6. All securities given, or to be given, under the twenty-eighth and twenty-ninth sections of the said Act, shall be deposited with the judge, and kept as part of the records of the Court, subject to the right of any person entitled to sue upon any such security, to such production and delivery thereof, as may be necessary in order to the exercise of such right.

7. Any creditor of the estate may, in the case of any person re-



quired, under the said twenty-eighth and twenty-ninth sections to give security, have inspection of such security, and may, if in his opinion the surety or sureties in such security are insufficient, apply, on notice, to the judge for an order that new or additional sureties be furnished; and the judge may upon such application make such order as shall seem reasonable, both as to the furnishing of sureties and as to the costs of the application.

8. The thirty-fifth section of the said Act is hereby amended by striking out the word "as" between the words "assignee" and "inspector" in the fourth line from the end, and inserting in lieu thereof the word "or."

9. The thirty-sixth section of the said Act is hereby amended by adding the following words, "subject to the proviso as to sale *en bloc* contained in the thirty-eighth section of this Act."

10. The thirty-eighth section of the said Act is hereby amended by adding thereto the following sub-section:—

"(2.) It shall not be necessary to advertise under the provisions of the seventy-fifth section of this Act any proposed sale of the estate *en bloc* under this section, although the estate may comprise real estate."

11. The forty-first section of the said Act is hereby amended by inserting the following at the end thereof:—"And every register of or coming into the possession of an official assignee, and every other record required to be kept by an official assignee in connection with the performance of his duties, shall be held to be the property of Her Majesty; and upon the death of an official assignee, or his ceasing to hold office, the judge shall be entitled and shall assume possession and control of such register or other record, which shall thereafter be kept among the records of the Court open to inspection as aforesaid."

12. The forty-third section of the said Act is hereby amended by inserting after the words "removal of property" in the thirteenth line the following words, "the creditors may, in case in their opinion the remuneration of the assignee under the preceding part of this section is inadequate, at any meeting called for the purpose, fix such additional remuneration to be paid out of the estate to the assignee as they shall think reasonable," and

by adding, after the word "creditors" in the third line from the end, the following words, "and the remuneration of the assignee, whether he be the official or the creditors' assignee, in cases in which the estate is settled by composition."

13. The forty-fourth section of the said Act is hereby amended by adding after the words "five creditors," the following words, "if there are five or more, or by all the creditors if there are less than five."

14. The sixty-sixth section of the said Act is hereby amended by adding at the end thereof the words "or judge."

15. The eighty-fourth section of the said Act is hereby amended by striking out the words "and revalue" in the last line, and by inserting at the end the words "and treat such liability as unsecured" (see however 40 Vict. chap. 41, s. 32).

16. The one hundred and twenty-eighth section of the said Act is hereby amended by striking out the words "either of the Superior Courts of Common Law or to the Court of Chancery, or to any one of the judges of the said Courts," and substituting in lieu thereof the words "the Court of Error and Appeal, or to any judge of that Court."

17. The fourth sub-section of the one hundred and forty-seventh section of the said Act is hereby amended by inserting after the word "present" in the sixth line thereof the words "in person or represented by proxy."

18. Every assignee shall, before the end of October in each year, fill up and transmit to the Minister of Agriculture, or in case this branch of the subject of statistics and the registration thereof be, by the Governor in Council, transferred to any other minister, then to such other minister, a schedule showing the particulars contained in the register to be kept by him under the forty-first section of the said Act, and such other schedules for the year ending the thirtieth day of September next preceding, relative to the insolvency matters transacted by him, as shall be, from time to time, prescribed by the Governor in Council, according to forms published in the *Canada Gazette*; and it shall be the duty of every assignee, to make from day to day, and to keep entries and records of the particulars to be comprised in such schedules.

19. Any assignee neglecting or refusing to fill up and transmit any schedule under the eighteenth section of this Act, or wilfully making a false, partial, or incorrect schedule thereunder, shall forfeit and pay the sum of forty dollars, together with full costs of suit, to be recovered by any person suing for the same by action of debt or information in any Court of record in the Province in which such return ought to have been made, or is made, or in the Exchequer Court of Canada, and one moiety whereof shall be paid to the party suing, and the other moiety in the hands of Her Majesty's Receiver-General to and for the public uses of Canada.

20. The statistics collected by the Minister of Agriculture, or such other minister as aforesaid, under this Act, shall be abstracted and registered, and the results thereof shall be printed and published in an annual report.

21. The word "county" in the said Act includes any judicial district in the Province of Ontario not organized into a county.

22. No amendment hereby made shall be held to be a declaration of the construction of any provision of the said Act as applicable to any proceeding heretofore had under the said Act.

#### 40 VICT. CHAP 41.

#### AN ACT TO AMEND THE "INSOLVENT ACT OF 1875, AND THE ACT AMENDING THE SAME."

[Assented to 28th April, 1877.]

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

1. The sections referred to in sections two to twenty-nine, both inclusive, of this Act are sections of "*The Insolvent Act of 1875.*"

2. Section eleven is amended by adding thereto the words "to be inserted once in the *Official Gazette*, and once in one local or the nearest published newspaper."

3. Section seventeen is amended by striking out the word "ten" in the first and third lines and inserting in lieu thereof the word "seven."

4. Section nineteen is amended by adding after the word "or," in the third line, the words "in Quebec by the proper Notary or

by;" and adding after the word "such" in the seventh line, the words "copy of the."

5. Section twenty is amended by adding after the word "held," in the seventh line, the words "within twenty-one days," and by striking out the words "three weeks," in the eleventh line and inserting in lieu thereof the words "ten days," and by adding immediately after the last word in the section the words "Provided always, that if the assignee omits to call such meeting to be held within the time above limited, the judge shall, on the application of the assignee or of any creditor, order the meeting to be called for the earliest possible day thereafter; and should the said omission have arisen from the negligence of the assignee, the judge shall order him to pay the costs of the application; Provided also, that on application of any creditor, the judge on being satisfied that there are creditors of the insolvent whose unsecured claims amount to at least one-third of his direct liabilities, resident in any place from whence their attested claims cannot with due diligence be received before the day of the meeting, may order that the meeting be adjourned to some day not more than a week thereafter; a copy of the order shall forthwith be served on the assignee, who shall forthwith, by prepaid letter or circular, notify each creditor of the adjournment. In case such order be made no business shall be transacted at the meeting, which shall stand adjourned according to the terms of the order."

6. Section twenty-one is amended by adding after the word "mail," in the first line, the words "prepaid and registered," and by striking out, in the second line, the words "in writing," and inserting in lieu thereof the words "of such meeting, and a list of the insolvent's creditors, and the amounts of their respective claims," and by striking out all after the word "require," in the seventh line, to the end of the section.

7. Section twenty-two is amended by adding thereto the words "in default of an appointment of chairman by the creditors."

8. Section twenty-eight is amended by inserting after the words "public officer," in the eighteenth line, the words following: "Provided always, that when any person appointed assignee or joint assignee, under the provisions of the twenty-seventh section, has

given the security for the due fulfilment and discharge of his duties, required by the preceding part of this section, then any person who has become surety in that behalf, when no longer disposed to continue his suretyship, may give notice thereof in writing to his principal, and also to the Secretary of State of Canada, and all accruing responsibility on the part of such person as such surety shall cease at the expiration of three months from the receipt of the last of such notices, or upon the acceptance by the Crown of the security of another surety, whichever shall first happen, and the principal shall, within one month from the receipt of the last of such notices, give the security of another surety, but if it appears to the Governor in Council that the period so limited for giving the security of a new surety is, for any reason insufficient, the Governor in Council may allow such further period for giving the security of such new surety as appears to him proper, but such extended period shall in no case exceed two months beyond the one month within which such new security is required to be given as above mentioned; and this proviso shall apply to the case of any new security which may from time to time be given."

9. Section thirty is amended by adding after the word "him," in the second line, the words "or if no security be required, then immediately upon his appointment."

10. Section thirty-one is amended by adding after the word "advertisement," in the second line, the words "to be inserted once in the *Official Gazette*."

11. Section thirty-two is hereby repealed and the following substituted in lieu thereof:—

" 32. No person shall act as the attorney or agent of any creditor, upon any question as to the appointment of such person as assignee, or in reference to any claim or demand of such creditor, on an insolvent estate of which such person is the assignee, nor shall any partner or employee of any person, act as the attorney or agent of any creditor in any matter in which under this section such person himself could not act, nor shall any assignee employ any person being his partner, as counsel, advocate, attorney, solicitor, or agent for such assignee in respect of the insolvent estate."

12. Section thirty-five is amended by adding thereto the words "or any claim against such estate; nor shall any assignee employ any inspector, nor shall any inspector employ any person being his partner, or being the partner of any assignee, or the partner of any inspector, as counsel, advocate, attorney, solicitor, or agent, in respect of the insolvent estate."

13. Section forty-three is amended by adding after the word "fixed," in the twenty-first line, the words "by the creditors at their first meeting, or by the inspectors within one week thereafter, subject in either case to revision by the court or judge, and in default of being so fixed, shall be settled," and by adding thereto the following paragraph: "Any assignee, who shall insert any charge in his account above or beyond the remuneration allowed to him by law, and who shall not remove it therefrom at the request in writing of any creditor or of the inspectors, within three days after the receipt of such request, shall forfeit and pay, in case the judge shall so order, treble the amount of the overcharge to the funds of the estate."

14. Section fifty-eight is repealed.

15. Section sixty-five is amended by adding thereto the words "Provided always, that the Judge shall not grant any discharge under this section in any case, unless some one of the following conditions be established by proof, that is to say:

1. That a dividend of not less than fifty cents in the dollar on the unsecured claims has been, or will be, paid out of the insolvent's property; or

2. That such a dividend might have been paid but for the negligence or fraud of the assignee or inspectors; or

3. That the insolvent had, on some one day prior to the institution of the proceedings in insolvency, mailed, prepaid and registered, to the address of each of his creditors, so far as known to him, a declaration acknowledging his insolvency; and that no proceedings in insolvency had been instituted against the insolvent for more than one month after the mailing of such notices; and that such a dividend would have been paid but for circumstances for which the insolvent cannot justly be held responsible,

arising more than one month after the mailing of such declaration."

16. Section seventy-one is amended by adding after the word "creditors" in the sixth line the words "or inspectors," and by adding to the section the following words: "But if the first meeting of creditors is not held until within such period of three months, then the power of terminating the lease may be exercised by the creditors at such meeting or by the inspectors, within one week thereafter, but not later."

17. Section seventy-two is amended by adding after the word "creditors" in the fourth line, the words "or inspectors."

18. Section seventy-three is amended by adding after the word "creditors" in the fourth line, the words "or inspectors."

19. Section seventy-four is amended by striking out the words "one year" in the fourth line and inserting in lieu thereof the words "six months."

20. Section seventy-five is amended by striking out the word "only" in the second line, and inserting in lieu thereof the words: "in any Province other than Quebec no sale shall be completed unless (a) the proposed sale has been sanctioned by the creditors at their first meeting or at any subsequent meeting called for the purpose, or by the inspectors; or (b) the assignee has advertised an auction sale or sale by tender in accordance with the directions in that behalf given by the creditors at their first meeting or at any subsequent meeting called for the purpose, or by the inspectors, and the inspectors' sanction in writing the acceptance of a price not greater than the amount bid or tendered; in the Province of Quebec no sale of real estate shall be made unless."

21. Section eighty-four is amended by striking out the last two lines, and inserting in lieu thereof the words, "if such claim is mature or exigible at the date of the assignment or the issue of the writ of attachment, or becomes so and remains unpaid thereafter, whether before or after proof, such creditor shall be entitled for ranking to treat the claim as unsecured, but for voting or consenting to a discharge, or a deed of composition and discharge, or for any other purpose, save ranking, he shall be still

considered to hold security within the meaning of this section, and shall, for all such purposes, put a value on the liability of the party primarily liable thereon as being his security for the payment thereof."

22. Section ninety-one is amended by striking out of the sixth line the word "three," and substituting in lieu thereof the word "two," and by striking out of the eighth line the words "two months," and substituting in lieu thereof the words "one month;" and by adding immediately after the last word in the section the words "and no assignee, payable by commission, shall be entitled to charge for any disbursement for procuring to be performed any service which he might properly have caused to be performed by any such clerk or other person, and for which he might otherwise charge under this Act; and no assignee whose remuneration is not fixed by this Act shall be entitled to remuneration for any service or for any disbursement in respect of any service which he might properly have caused to be performed by such clerk or other person.

23. Section one hundred and two is amended by striking out after the word "meeting," in the fourth line, the words "and representing also the majority in value of such creditors," and by adding after the last word in the section the words, "Provided, however, that no costs of or incidental to any such reference shall be paid out of the estate, and the decision of the judge on any reference under this section in which the resolutions referred involve the appointment of an assignee or inspector to the estate, shall be final."

24. Section one hundred and three is amended by striking out the words "three weeks" in the second line, and inserting in lieu thereof the words "ten days."

25. Section one hundred and eighteen is amended by striking out the words "and the costs of the judgment of confirmation of the discharge of the insolvent, except when such confirmation is upon a deed of composition, or of the discharge if obtained direct from the Court."

26. Section one hundred and twenty-three is amended by striking out the words "Superior Courts of Common Law, and of



"the Court of Chancery or any five of them, of whom the Chief Justice of the Province of Ontario, or the Chancellor, or the Chief Justice of the Common Pleas, shall be one;" and inserting in lieu thereof the words "Court of Appeal, or a majority of them."

27 Section one hundred and twenty-five is amended by striking out the words "if not an official assignee," and adding at the end of the section the words "from the assigneeship of the estate."

28. Section one hundred and twenty-eight is amended by striking out the words "or unless he," in the thirty-fifth line, and inserting in lieu thereof the word "and," and by adding after the last word of the section the words, "The judgment of the Court to which, under this section, the appeal can be made, shall be final."

29. Section one hundred and thirty-three is amended by adding after the word "presumed" in the last line but one, the words "*prima facie*."

30. Section one hundred and thirty-six is amended by adding after the words "knowing or," in the eighth line, the words "having probable cause for."

31. For all the purposes of "*The Insolvent Act of 1875*," the temporary Judicial District of Nipissing, in the Province of Ontario, shall be taken and considered as part of the County of Renfrew, and so much of the territory comprising the Territorial District of Parry Sound and the Territorial District of Muskoka as is not already included in the Judicial County of Simcoe, shall be taken and considered as part of the said judicial County of Simcoe; and all persons and courts having authority or jurisdiction in the said Counties of Renfrew and Simcoe respectively, under the said Act, shall have like authority and jurisdiction in the said District of Nipissing, and the said Districts of Parry Sound and Muskoka respectively.

32. Section fifteen of the Act thirty-ninth Victoria, chapter thirty, intituled: "*An Act to amend the Insolvent Act of 1875*," is hereby repealed.

33. No assignee shall directly or indirectly at any time advance or lend to any creditor any money, or become liable for any creditor to any other person for any money, upon the security or col

lateral security of such creditor's claim against the estate, or of any dividend declared or to be declared thereon, or of any security held by or for such creditor upon any part of the estate.

34. Every official assignee shall print and cause to be posted up in a conspicuous place in his office, sections thirty-two, forty-three and forty five of the said "*Insolvent Act of 1875*," as amended, and at every meeting of creditors a printed copy of the said sections shall be laid upon the table.

35. If it appears to the Court or judge that an official assignee has been guilty of any fraud, breach of duty or wilful violation of any of the provisions of "*The Insolvent Act of 1875*," or the amending Acts, or has inserted any improper charge in any account or claim preferred by him against the estate, the Court or judge shall forthwith make a report of the facts to the Secretary of State of Canada, for the information of the Governor.

36. In all cases where money or costs are ordered by the Court or judge to be paid, the same proceedings, as near as may be, may be taken for the collection of such money or costs as if the order was a judgment of the Court and the same were payable under such judgment.

37. The assignee shall, within the first five days of each calendar month, file in the office of the Clerk of the Court, a statement of the receipts and disbursements of the estate during the last preceding month, shewing also the balance of cash then in bank.

38. No amendment hereby made shall be held to be a declaration of the construction of any provision of "*The Insolvent Act of 1875*" as applicable to any proceeding heretofore had under the said Act, and the amendments made by the fifth, fourteenth, fifteenth, nineteenth and twenty-second sections of this Act shall not apply to any case in which an assignment was made, or a writ of attachment issued, before the passing of this Act.

39. The "*Insolvent Act of 1875*," the Act of 1876 amending it, and this Act, may be cited together as "*The Insolvent Act of 1875, and amending Acts*."



## FORMS.

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### FORM A.

#### THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

To (*name residence and description of insolvent.*)

You are hereby required, to wit, by A. B., a creditor, for the sum of \$ *(describe in a summary manner the nature of the debt,)* and by C. D., a creditor, &c., to make an assignment of your estate and effects, under the above-mentioned Act for the benefit of your creditors.

*place*

*date.*

*Signature of Creditor or Creditors.*

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### FORM. B.

#### THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

CANADA,  
Province of  
District of

}

A. B.—, (*name, residence, and description.*)

Plaintiff,

vs.

C. D.— (*name, residence, and description.*)

Defendant,

I, A. B.— (*name, residence, and description*) being duly sworn, depose and say:—

1. I am the Plaintiff in this cause (*or one of the Plaintiffs, or the clerk, or the agent of the Plaintiff in this cause duly authorized for the purposes thereof*).

2. The Defendant is indebted to me (or to the Plaintiff, or as the case may be) in the sum of        dollars currency for (state concisely and clearly the nature of the debt).

3. To the best of my knowledge and belief the Defendant is insolvent within the meaning of "The Insolvent Act of 1875 and amending Acts," and has rendered himself liable to have his estate placed in liquidation under the said Act; and my reasons for so believing are as follows—(state concisely the facts relied upon as rendering the debtor insolvent, and as subjecting his estate to be placed in liquidation).

4. I do not act in this matter in collusion with the defendant, nor to procure him any undue advantage against his creditors.

And I have signed (or I declare that I cannot sign).

Sworn before me this

day of                      187

and if the deponent cannot sign, add  
—the foregoing affidavit having been  
first read over by me to the deponent.

### FORM C.

#### THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

CANADA, } VICTORIA, by the Grace of God, of the  
Province of B. C. } United Kingdom of Great Britain and Ire-  
District of B. C. } land, Queen, Defender of the Faith.  
No.                      for B. C.

To the Official Assignee of the County (or Judicial District or  
Electoral District, as the case may be) of

WE command you at the instance of 4.17 J. H. D. F. H. B. GREETING  
to attach the estate and effects, moneys and securities for money.  
vouchers, and all the office and business papers and documents of

of every kind and nature whatsoever,  
 of and belonging to *Alex. G. B. C.* if the  
 same shall be found in (~~name of district or other territorial juris-~~  
~~isdiction~~), and the same so attached, safely to hold, keep and detain  
 in your charge and custody until the attachment thereof, which  
 shall be so made under, and by virtue of, this writ, shall be deter-  
 mined in due course of law.

We command you also to summon the said *A. G. B. C.*  
 to be and appear before Us, in our *Cy.* Court for  
*held at N. W.* at *Wednesday 19<sup>th</sup>* in the County (or District  
 of ~~\_\_\_\_\_~~ on the ~~\_\_\_\_\_~~ day of *Nov. next* to show  
 cause, if any he hath, why his estate should not be placed in  
 liquidation under "The Insolvent Act of 1875 and amending  
 Acts," and further to do and receive what, in our said Court before  
 Us, in this behalf shall be considered; and in what manner you  
 shall have executed this Writ, then and there certify unto Us with  
 your doings thereon and every of them, and have you then and  
 there also this Writ.

IN WITNESS WHEREOF, We have caused the Seal of our said  
 Court to be hereunto affixed, at *N. W.* aforesaid  
 , this *14<sup>th</sup>* day of *October* in the year  
 of Our Lord, one thousand eight hundred and seventy *nine*  
 in the *42<sup>nd</sup>* year of our Reign.

FORM D.

THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

A. B.,

Plaintiff.

C. D.,

Defendant.

A writ of attachment has issued in this cause.

(Place date.)

(Signature,)  
 Official Assignee.

## FORM E.

## THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

This assignment made between \_\_\_\_\_ of the  
first part, and \_\_\_\_\_ of the second part,  
witnesses,

• (or)  
On this \_\_\_\_\_ day of \_\_\_\_\_  
before the undersigned notaries  
came and appeared  
of the first part, and  
of the second part, which said parties declared to us nota-  
ries :—

That, under the provisions of "The Insolvent Act of 1875 and  
amending Acts," the said party of the first part, being insolvent,  
has assigned, and hereby does assign to the said party of the  
second part, accepting thereof as assignee under the said Act, and  
for the purposes therein provided, all his estate and effects, real  
and personal, of every nature and kind whatsoever.

To have and to hold to the party of the second part as assignee  
for the purposes and under the Act aforesaid.

In witness whereof, &c.

(or)

Done and passed, &c.

## FORM F.

## THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

In the matter of A. B., an Insolvent.

## Schedule of Creditors.

1. Direct Liabilities.					Total.	
Name.	Residence.	Nature of Debt.	Amount.			
2. Indirect liabilities, maturing before the day fixed for the first meeting of creditors.						
Name.	Residence.	Nature of Debt.	Amount.			
3. Indirect liabilities, maturing after the day fixed for the first meeting of creditors.						
Name.	Residence.	Nature of Debt.	Amount.			
4. Negotiable paper, the holders of which are unknown.						
Date.	Name of Maker.	Names liable to Insolvent.	When due.	Amount.		



## FORM G.

## THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

In the matter of                      an Insolvent.

The Insolvent has made an assignment of his estate to me (*or*,  
a writ of attachment has been issued in this cause) and the credi-  
tors are notified to meet at                      in  
on                      the                      day of                      at  
                    o'clock                      to receive statements of his  
affairs, and to appoint an Assignee if they see fit.  
(*Date and residence of Assignee.*)

(*Signature.*)

Assignee.

(*The following is to be added to the notices sent by post.*)

The Creditors holding direct claims and indirect claims for one  
hundred dollars each and upwards, are as follows: (*names of*  
*Creditors and amount due*) and the aggregate of claims under  
one hundred dollars is \$                      .

(*Date.*)

(*Signature.*)

## FORM H.

## THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

In the matter of A. B., an Insolvent.

This deed of release (*or transfer*) made under the provisions of  
the said Act between (C. D.,)

Assignee to the estate of the said Insolvent of the first part; and  
(E. F.,)                      of the second part, witnesseth:

That whereas by a resolution of the creditors of the Insolvent  
duly passed at a meeting thereof, duly called and held at

, on the                      day of                      , the said party of

the second part was duly appointed Assignee to the estate of the said Insolvent: Now, therefore, these presents witness that the said party of the first part, in his said capacity, hereby releases (or transfers) to the said party of the second part, the estate and effects of the said Insolvent, in conformity with the provisions of the said Act; and for the purposes therein provided.

In witness whereof, &c.

*(This form shall be adapted in the Province of Quebec to the notarial form of execution of documents prevailing there.)*

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FORM I.

THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

In the matter of

A. B. [or A. B. & Co.,]

an Insolvent.

I, the undersigned [*name and residence*], have been appointed Assignee in this matter.

Creditors are requested to file their claims before me, within one month.

(Place Date,)

(Signature)

Assignee.

---

FORM J.

THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

CANADA,	}	In the (name of Court)
PROVINCE OF		In the matter of A. B. (or
District (or County) of		A. B. & Co.,) an Insolvent.

The undersigned has filed in the office of this Court, a consent by his creditors to his discharge (or a deed of composition and discharge executed by his creditors), and on the \_\_\_\_\_ day of \_\_\_\_\_ next, he will apply to the said

Court (*or to the Judge of the said Court, as the case may be*) for a confirmation of the discharge thereby effected.

(*Place, Date.*)

(*Signature of Insolvent, or of his Attorney ad litem.*)

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FORM K.

THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

In the matter of A. B.,

An insolvent.

I, A. B., of an insolvent, now making application to the for a confirmation of my discharge (*or of my deed of composition and discharge*), being duly sworn, depose and say :

That no one of my creditors who has signed the said discharge (*or the said deed of composition and discharge*) has been induced so to do by any payment, promise of payment, or advantage whatsoever made, secured or promised to him by me, or with my knowledge, by any person on my behalf.

And I have signed.

Sworn before me at  
this day of  
187

}

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FORM L.

THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

CANADA, In the (*name of Court*)  
PROVINCE OF } In the matter of A. B. (*or A. B. & Co*)  
District (*or County*) of } an Insolvent.

On the day of next,  
the undersigned will apply to the said Court (*or the Judge of the said Court, as the case may be,*) for a discharge under the said Act.

(*Place date.*)

(*Signature of the Insolvent, or of his Attorney ad litem.*)

## FORM M.

## THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

In the matter of

A. B.,

an Insolvent.

In consideration of the sum of \$                      whereof quit; C. D., Assignee of the Insolvent, in that capacity hereby sells and assigns to E. F., accepting thereof, all claim by the Insolvent against G. H. of (*describing the Debtor*) with the evidences of debt and securities thereto appertaining, but without any warranty of any kind or nature whatsoever.

C. D., Assignee.

E. F.

## FORM N.

This deed made under the provisions of "The Insolvent Act of 1875 and amending Acts," the                      day of                      &c., between A. B. of                      &c., in his capacity of Assignee of the estate and effects of                      an Insolvent, under a deed of assignment executed on the                      day of                      at                      in                      and of a release made and executed on the                      , day of                      , in                      (or under an order of the Judge made at                      on the                      day of                      ) of the one part, and C. D. of                      &c., of the other part, witnesseth: That he, the said A. B., in his said capacity, hath caused the sale of the real estate hereinafter mentioned, to be advertised as required by law, and hath adjudged (or and hath offered for sale pursuant to such advertisement, but the bidding therefor being insufficient did withdraw the same from such sale, and hath since by authority of the creditors agreed to sell) and doth hereby grant, bargain, sell, and confirm the same, to wit: unto the said C. D., his heirs and assigns for ever, all (*in Ontario, Nova Scotia and New Brunswick, Manitoba and British Columbia, insert "the rights*

and interests of the insolvent in") that certain lot of land, &c  
*(insert here a description of the property sold)*: To have and to hold the same, with the appurtenances thereof, unto the said C. D., his heirs and assigns for ever. The said sale is so made for and in consideration of the sum of \$                      in hand paid by the said C. D. to the said A. B., the receipt whereof is hereby acknowledged *(or of which the said C. D. hath paid to the said A. B., the sum of                      the receipt whereof is hereby acknowledged and the balance, or sum of \$                      the said C. D. hereby promises to pay to the said A. B., in his said capacity, as follows, to wit—(here state the terms of payment)—* the whole with interest payable                      and as security for the payments so to be made, the said C. D., hereby specially mortgages and hypothecates to and in favour of the said A. B., in his said capacity, the lot of land and premises hereby sold).

In witness, &c.

A. B. [L. S.]

C. D. [L. S.]

Signed, sealed, and delivered  
 in the presence of  
 E. F.

*(This form shall be adapted in the Province of Quebec to the notarial form of execution of documents prevailing there.)*

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#### FORM O.

#### THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

In the matter of

A. B. *(or A. B. & Co.,)*

an Insolvent.

A dividend sheet has been prepared, open to objection, until

the                      day of                      , after which dividend will  
be paid.

(Place.)

(Date.)

*Signature of Assignee.*

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FORM P.

THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

In the matter of

A B,

An Insolvent, and

C D, .

Claimant.

I, C. D., of                      , being duly sworn in  
depose and say :

1. I am the claimant (*or*, the duly authorized agent of the claimant in this behalf, and have a personal knowledge of the matter hereinafter deposed to, *or* a member of the firm of claimants in the matter, and the said firm is composed of myself                      and of E. F. .)

2. The Insolvent is indebted to me (*or* to the claimant) in the sum of                      dollars, for (*here state the nature and particulars of the claim, for which purpose reference may also be made to accounts or documents annexed*).

3. I (*or* the claimant) hold no security for the claim, (*or* I *or* the claimant hold the following, and no other, security for the claim namely: *state the particulars of the security*).

To the best of my knowledge and belief, the security is of the value of                      dollars.

Sworn before me at  
this                      day of

} And I have signed.

## ADDITIONAL FORMS.

## FORM 1. See Sec. 4.

## THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

In the County Court of the County of  
County of            I, A. B. (*name, residence, and description*),  
                              } being duly sworn depose and say :

To Wit:            1. That I am the plaintiff (*or the duly authorized agent of the plaintiff in this behalf, and have a personal knowledge of the matter hereinafter deposed to, or a member of the firm of plaintiffs in this matter, and the said firm is composed of myself and E. F.*)

2. That the defendant is indebted to me (*or to the plaintiff as the case may be*) in the sum of \$                            for (*state concisely and clearly the nature of the debt.*)

3. I do not act in this matter in collusion with the defendant nor to procure him any undue advantage against his creditors. And I have signed (*or declared I cannot sign*).

Sworn before me at the  
of                            in the County of  
                              this                            day

of                            A.D. 187

*and if the deponent cannot sign, add:—*  
"the affidavit having been first read and explained to the said A. B., who seemed perfectly to understand the same, and made his mark in my presence."



## FORM 2. See Sec. 4.

## THE INSOLVENT ACT OF 1875 AND AMENDING ACTS.

To (*name, residence and description of Insolvent*), you are hereby required to wit by A. B. a Creditor for the sum of

§ (describe in a customary manner the nature of the debt), and by C. D., a Creditor, &c., to make an assignment of your estate and effects under the above-mentioned Act, for the benefit of your Creditors and we (the said A. B. and C. D.), hereby elect and appoint the office of \_\_\_\_\_ of \_\_\_\_\_ in the County of \_\_\_\_\_, as the domicile at which service of any answer, notice or proceeding may be served on us or on the said G. H., or any of his partners or clerks for us.

See Sec 114

## FORM 3.

## DEED OF COMPOSITION AND DISCHARGE (SECS. 49 &amp; 52).

*The Insolvent Act of 1875 and Amending Acts.*

This Indenture made the \_\_\_\_\_ day of \_\_\_\_\_ one thousand eight hundred and \_\_\_\_\_

Between A. B., of etc. (hereinafter called the insolvent), of the first part, and the several persons, firms and corporations who are creditors of the insolvent (hereinafter called the creditors), of the \_\_\_\_\_ part, and C. D., assignee of the estate and effects of the said A. B., of the \_\_\_\_\_ part.

Whereas the said insolvent is unable to pay his liabilities in full, ~~and his creditors have agreed with him for a composition and discharge upon the terms, and in manner hereinafter mentioned, and under the provisions of the Insolvent Act of 1875 and Amending Acts; and whereas the said insolvent has agreed to secure the payments of his creditors hereinafter mentioned by (set out the nature of the securities offered).~~ *but his have 2 part of estate sum of cents in dollars.*

Now, therefore, this Indenture witnesseth, that in consideration of his indebtedness, ~~and of the discharge hereby given, the~~



said insolvent covenants and agrees with all his creditors, collectively and severally, that he will pay to them, and each of them respectively, a composition of ——— cents in the dollar of their respective claims against him, in manner and at the times following, that is to say: ——— cents in the dollar in ——— months from the ——— day of ——— 187 ; ——— cents in the dollar in ——— months from said date, &c., &c. And that he will give to each of them his promissory notes for such composition payments secured by (*as the case may be*), such notes to bear date on the said ——— day of ——— 187 , and to be payable according to the times of said respective composition payments, and the said insolvent further covenants and agrees to pay forthwith upon confirmation hereof all costs, charges and expenses connected with the proceedings in insolvency respecting his estate, and inclusive of the costs of this deed and of confirming the composition and discharge hereby effected (*including the costs of the solicitor for the assignee as between solicitor and client in connection with said proceedings, and the assignee's remuneration*).

~~And in consideration of the said composition payments so to be made, and of the said security so to be given,~~ the said creditors do, and each of them doth, release and discharge unto the said insolvent all their respective claims against him. And the said creditors do hereby direct and authorize the assignee of the estate of the said insolvent to deliver up and convey to the said insolvent all his estate and effects upon this deed of composition and discharge being executed by a majority in number of the creditors of the said insolvent who have proved claims to the amount of one hundred dollars and upwards, and who represent at least three-fourths in value of all the claims of one hundred dollars and upwards, which have been so proved. *And the said creditors do hereby direct and authorize the assignee of the estate of the said insolvent to deliver up and convey to the said insolvent all his estate and effects upon this deed of composition and discharge being executed by a majority in number of the creditors of the said insolvent who have proved claims to the amount of one hundred dollars and upwards, and who represent at least three-fourths in value of all the claims of one hundred dollars and upwards, which have been so proved.*

And it is declared and agreed that this deed of composition and discharge is made in pursuance of the Insolvent Act of 1875, and may be confirmed thereunder ; and also that the same shall be ineffectual unless and until the same shall be executed by the aforesaid proportions in number and value of the said creditors of the said insolvent.

In witness whereof the said parties have hereunto set their hands and seals.

Signed, sealed and delivered by each party hereto in the presence of the witness whose name is set opposite to each signature respectively.

[L.S.]

[L.S.]

[L.S.]

[L.S.]

## FORM 4.

ORDER CONFIRMING CONSENT DISCHARGE, OR DEED OF COMPOSITION AND DISCHARGE (SEC. 57).

*The Insolvent Act of 1875 and Amending Acts.*

CANADA } In the County Court of the County of \_\_\_\_\_  
Province of \_\_\_\_\_  
County of \_\_\_\_\_

In the matter of

A. B.,

An Insolvent.

Upon hearing the application of the above named insolvent, and upon reading his petition for the confirmation, under the Insolvent Act of 1875, and amending Acts, of a certain consent discharge, (or, of a certain deed of composition and discharge,) and it appearing that the said insolvent has filed in the office of this Court the said consent discharge (or deed of composition and discharge), duly executed by the required proportion of his creditors under the said Acts, together with the certificate of the assignee under the fifty-second section of the said Act annexed thereto; and it appearing that no one of the creditors who have signed the said consent discharge (or deed of composition and

discharge), has been induced to do so by any preferential payment, promise of payment or advantage whatsoever, made, secured or promised to him, by or on behalf of the said insolvent, and that the said insolvent has delivered a sworn statement of his liabilities and assets as required by said Act; and upon reading the notice of this application, and it appearing that the same has been duly advertised and sent to the creditors of said insolvent pursuant to the said Act;

And no one opposing the said application for confirmation of such discharge (or upon hearing what was alleged in opposition to granting such confirmation of discharge, and the evidence adduced),

I do order that the said ~~consent discharge~~ (or deed of composition and discharge), be and the same is hereby absolutely confirmed.

*Or,*

I do order that the discharge of the said insolvent contained in the said consent discharge (or deed of composition and discharge), be and the same is hereby confirmed, to take effect only on, from and after the — day of — until which said last mentioned day the said discharge is hereby suspended.

*Or,*

I do order that the discharge of the said insolvent contained in the said consent discharge (or deed of composition and discharge), be and the same is hereby confirmed; nevertheless I hereby declare such discharge to be of the second class under the said Act.

Given under my Hand and the Seal of the County  
Court of the County of — at — in  
the County of — on the — day of —  
in the year of our Lord, 187 .

Judge of the County Court of the County of —

## FORM 5.

ORDER OF DISCHARGE, WHEN GRANTED AFTER EXPIRATION OF  
ONE YEAR FROM DATE OF ASSIGNMENT OR WRIT OF ATTACH-  
MENT (SEC. 64).

*The Insolvent Act of 1875 and Amending Acts.*

CANADA.	}	In the County Court of the Couty of —
Province of —		
County of —		

In the matter of

A. B.,

An Insolvent,

Upon hearing the application of the above-named insolvent, and upon reading his petition for a discharge under the Insolvent Act of 1875, and amending Acts, and the affidavits and papers filed in this matter; and it appearing that on the — day of — in the year of our Lord one thousand eight hundred and — the said insolvent duly executed a deed of assignment under the said Act (or a writ of attachment under the said Acts issued against the said insolvent); and it further appearing that although more than one year has elapsed from the date of said assignment (or the issue of said writ of attachment), yet the said insolvent has not obtained from the required proportion of his creditors a consent to his discharge, or the execution of a deed of composition and discharge under the said Act; and it also appearing that the said insolvent has in all respects conformed himself to the provisions of the said Act; and upon reading the notice of this application, and it appearing that the same has been duly advertised and sent to creditors of said insolvent, pursuant to the said Act; and (*if the judge has required it*) upon reading the report of the assignee in this matter upon the conduct of the said insolvent, and the state of his books and affairs before and at the date of his insolvency; and no one opposing the said application for a discharge (*or upon hearing what was alleged in*

opposition to granting said discharge and the evidence adduced),

I do order that an absolute and unconditional discharge, under the said Act, be and the same is hereby allowed and granted to A. B., the said insolvent.

*Or,*

I do order that a discharge, under the said Act, be and the same is hereby allowed and granted to A. B., the said insolvent, to take effect only on, from and after the — day of ——— until which said last mentioned day this discharge is hereby suspended.

*Or,*

I do order that a discharge, under the said Act, be and the same is hereby allowed and granted to the said insolvent; nevertheless, I hereby declare such discharge to be of the second class, under the said Act.

Given under my Hand and the Seal of the County Court of the County of ——— at ——— in the County of ——— on the — day of ——— in the year of our Lord, 187 .

Judge of the County Court of the County of——

#### FORM 6.

#### AFFIDAVIT VERIFYING STATEMENT OF LIABILITIES, (FORM F) AND STATEMENT OF ASSETS (SECS. 17, 23 & 140).

#### *The Insolvent Act of 1875 and Amending Acts.*

In the matter of

County of —— }

A. B.,

TO WIT :

An Insolvent.

I, A. B., of —— the above named insolvent, being duly sworn, depose and say as follows :

1. The annexed statement now shown to me and marked with

the letter "A" contains a true, full and correct list of my liabilities according to its purport, and correctly classified, together with the names, additions and residences of my creditors, and the securities held by them, in so far as they are known to me.

2. The annexed statement now shown to me and marked with the letter "B" contains a true, full and correct statement of all the property and assets vested in the assignee in this matter by the deed of assignment (*or* by the writ of attachment) herein, and the said statement last named also includes a full and true account of the causes to which I attribute my insolvency, and the deficiency of my assets to meet my liabilities.

Sworn before me at ——— in the  
 County of ——— this ——— day }  
 of ——— A.D. 187 .  
 A Commissioner in B. R., &c.

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### FORM 7.

#### CONTESTATION OF CLAIM—NOTICE OF OBJECTION (SECS. 93, 95 & 114).

##### *The Insolvent Act of 1875 and Amending Acts.*

		In the matter of	
County of ———	}		A. B.,
TO WIT :			An Insolvent.
			C. D.,
			Claimant.
		AND	
			E. F.,
			Contestant.

The said contestant hereby appears and contests the claim of the said claimant on the estate of the said insolvent, filed on or about the ——— day of ——— A.D. 187 , and says that the said

claimant is not a creditor of the said insolvent for the amount of his said pretended claim, nor any part thereof, nor entitled to be collocated on the said estate, or on any dividend sheet therefor, because the contestant says (*set out grounds of objection distinctly and concisely*).

Wherefore the contestant prays that the said claimant be not collocated for, nor paid the amount of his said pretended claim, or any part thereof, and that the said claim may be dismissed with costs against the said claimant.

G. H.,

Attorney for Contestant.

Dated — day of — A.D. 187 .

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# RULES OF PRACTICE AND TARIFFS OF FEES.

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## IN THE PROVINCE OF QUEBEC.

*Rules and Orders and Tariff of Fees made by the Judges of the Superior Court for Lower Canada, under and by virtue of the Statute 27 and 28 Vict. chap. 17, "intituled "An Act respecting Insolvency."*

See sections 122 and 124 of the Insolvent Act of 1875.

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1. There shall be assigned in the court house of each judicial district at which the sittings of the superior court are held, two rooms for matters in insolvency, one in which the sittings of the judge shall be held, and the other for the office of the clerk in insolvency.

2. All judicial proceedings in insolvency shall be had and conducted in the said court room alone, and not elsewhere; and the sittings of the judge shall commence at 11 A. M., or at such hour as the judges or judge in each district shall hereafter appoint, and shall continue till the business of the day shall be completed, or until the judge shall adjourn the same.

3. The clerk's office shall be kept open every juridical day, from 9 A. M. to 4 P. M., and shall be attended during that time by a clerk appointed by the district prothonotary, and who shall be known as "The Clerk in Insolvency."

4. To ensure regularity of proceedings at the sittings of the judges, the business shall be conducted in the following order:

1. Meetings of creditors ;
2. Motions :
3. Rules *nisi* ;
4. Petitions, except as hereafter mentioned ;



5. Proceedings on applications for discharge of insolvents ;
6. Proceedings on applications for discharge of assignee ;
7. Appeals.

5. Proceedings before a judge or court may be conducted by the insolvent himself, or by any party having interest therein, or by their attorney *ad litem*, admitted to practise in Lower Canada, and by no other person.

6. All motions, petitions and claims, and all papers in the nature of pleadings in insolvency shall be intituled: "In Insolvency for the District of.....In the matter of..... Insolvent, and. . Claimant, Petitioner or Applicant," as the case may be, plainly written, without interlineations or abbreviations of words; and the subject or purpose thereof shall be plainly and concisely stated. They shall also be subscribed by the petitioner, applicant or claimant, or by his attorney *ad litem* for him. And they shall be subject to the ordinary rules of procedure of the superior court in respect of similar papers, as regards the names and designations of the parties, and the mode in which they shall be docketed and filed.

7. No paper of any description shall be received or filed in any case, unless the same shall be properly numbered and intituled in the case or proceeding to which it may refer or belong; and be also endorsed with the general description thereof, and with the name of the party or his attorney *ad litem* filing the same.

8. In all appealable matter in dispute, the pretensions of the parties shall be set forth in writing, in a clear, precise and intelligible manner, and the notes of the verbal evidence taken before the assignee shall be plainly written, shall be signed by the witness if he can write and sign his name, and shall be certified by the assignee, as having been sworn before him. And in the event of an appeal, the assignee shall make and certify a transcript from his register of the proceedings before him in the manner appealed from. And he shall also make and certify a list of the documents composing such proceedings and appertaining thereto, and shall annex such transcript and list to such documents with a strong paper or parchment cover, before producing the record before the judge, as required by the said Act.

9. All proceedings before a judge or court shall be entered daily, in order of date, in a docket of proceedings, to be kept by the clerk for each case ; and shall from time to time, and until the close of the estate, be fairly transcribed in registers suitable therefor, which shall be kept and preserved by the prothonotary, in the same manner as the registers of proceedings of the superior court.

10. No demand, petition or application of which notice is required to be given, either by the provisions of the said Act or by an order of the judge or court shall be heard until after such notice shall have been given, and due return thereof made and filed in the case.

11. Except where otherwise limited and provided by the said Act and upon good cause shewn, the time for proceeding after notice thereof has been given, may be enlarged by the judge or court whenever the rights of parties interested may seem to require it for the purposes of justice.

12. Whenever a particular number of days is prescribed for the doing of an act in insolvency, the first and last day shall not be computed nor any fractions of a day allowed ; and when the last day shall fall upon a Sunday or holiday, the time shall be enlarged to the next juridical day.

13. All affidavits of indebtedness made by a creditor or by the clerk or agent of a creditor, shall set forth the particulars and nature of the debt, with the same degree of certainty and precision as is required in affidavits to hold to bail in civil process in the courts of Lower Canada.

14. All writs of attachment issued under the said Act, shall, as issued, be numbered and entered successively by the clerk in a book, to which there shall be an index, and to which access for examination or extract shall be had *gratis*, at all times during office hours.

15. Every such writ shall describe the parties thereto, in the same manner as they are described in the said affidavits of debt ; and the declaration accompanying the said writ shall be similar in its form to the declarations required to be filed in ordinary suits in the superior court. (The latter part of this rule is not

applicable to the writ of attachment under the present practice. See ante, p. 70).

16. No such writ shall issue until after the affidavit of debt upon which the writ is founded, shall have been duly filed in the clerk's office.

17. All services of writs, rules, notices, warrants and proceedings in Lower Canada, except otherwise specially prescribed by the said act, may be made by a bailiff of the superior or circuit court, whose certificates of service shall be in the form required for service of process in the said courts; or by any literate person, who shall certify his service by his affidavit; and in either case, the manner, place and time of such service shall be described in words, and also the distance from the place of service to the place of proceeding.

18. All services of writs, rules, notices, warrants or other proceedings shall be made between the hours of 8 A. M. and 7 P. M., unless otherwise directed by a judge or court upon good cause shewn.

19. Writs of attachment need not be called in open court, but shall be returned on the return day into the clerk's office, and shall be there filed for proceedings thereon, as may be advised or directed.

20. Every day, except Sundays and holidays, shall be a judicial day for the return of said writs, and for judicial and court proceedings.

21. The sheriff to whom the writ of attachment shall be directed shall not be required to make any detailed inventory or *procès verbal* of the effects or articles by him attached under such writ; but a full and complete inventory of the insolvent's estate, so attached by the sheriff, shall be made by the assignee or person who shall be placed in possession thereof as guardian under such writ; by sorting and numbering the books of account, papers, documents and vouchers of the estate, and entering the same, with the other assets and effects thereof, in detail, in a book for the same, which shall be called "The Inventory of the Estate of.....," and which shall be filed by the said assignee or person in possession, on the return day of the said writ, as re-

quired by the said Act ; and the said inventory shall be open for examination or extract at all times during office hours, *gratis*.

22. Immediately upon the execution of the voluntary deed or instrument of assignment to the assignee, he shall give notice thereof by advertisement in the form D of the said Act, requiring, by such notice, all creditors of the insolvent to produce before him, within two months from the date thereof, their claims, specifying the security therefor, with the vouchers in support of such claims, as required by such notice.

23. The clerk shall prepare for the judge or court, a list of matters pending, or ready and fixed for proceeding on each day, following therein the order of procedure prescribed by the 4th rule, which list shall be communicated to the judge on the previous day.

24. The record of proceedings in each case shall at all times during office hours, be accessible, at the clerk's office, to creditors and others in interest in such cases, for examination or extract therefrom, *gratis*. And in like manner the minutes of meetings of creditors, and the registers of proceedings, together with the claims made and the documents in possession of the assignee, shall also be accessible to creditors and others in interest in the case, at convenient hours, daily, to be appointed by the said assignee.

25. The assignee shall, from time to time, under order of date, and within twenty-four hours after the proceedings had before him, file in the said clerk's office, a clear copy under his signature as such assignee, of such proceedings, together with a copy of the several newspapers and Official Gazette, in which he shall have caused notices of such proceedings to be advertised, which said copy and newspapers shall form part of the record of proceedings of the particular case.

26. The assignee shall, on the third juridical day of each month, after he shall have commenced to deposit estate moneys in a bank or bank agency, as required by the said Act, file of record in the case an account of the estate, showing the balance thereof in his hands, or under his control, made up to the last day of the preceding month. And no moneys so deposited shall be withdrawn

without a special order of the court, entered in the docket of proceedings in the case, or upon a dividend sheet prepared and notified, as required by the said Act, or unless otherwise ordered by the creditors, under the powers conferred upon them by the said Act.

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TARIFF OF FEES IN INSOLVENCY, FOR THE PROVINCE OF QUEBEC.

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IN PROCEEDINGS FOR COMPULSORY LIQUIDATION,

ON BEHALF OF THE PLAINTIFFS,

<i>If not contested :</i>	\$ cts.
To the prothonotary for writ of attachment.....	1 80
Do. copy of writ.....	0 30
Sheriff for warrant.....	2 50
Copies of warrant, each.....	0 50
All proceedings by the sheriff or his agent or messenger in the seizure and return, exclusive of mileage.....	2 00
Guardian, per day.....	1 00
Do. making up inventory and statements, to be subject to taxation by the judge :	
To the prothonotary on return of writ.....	5 00
Crier's fee on return.....	0 80
To the prothonotary for copy of order for meeting.....	0 50
To the prothonotary for meeting.....	1 00
To the prothonotary for each copy of judgment appointing official assignee.....	0 50
Attorney's fee for conducting proceedings to appointment of official assignee.....	30 00
<i>If contested, additional fees :</i>	
To the prothonotary on inscription.....	2 00
To the prothonotary on every witness examined for plaintiff, exceeding two in number.....	0 30
And for each subsequent deposition exceeding 400 words in length, for every 100 words.....	0 10

Attorney's fee, additional.....	\$20 00
Counsel fee at enquête.....	10 00

## ON BEHALF OF THE DEFENDANTS,

*If not contested :*

Attorney's fee for appearance.....	10 00
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*If contested, additional fees :*

To the prothonotary on filing petition in contestation.....	6 00
On every witness examined for defendant, not exceeding two in number.....	0 30
And for each subsequent deposition exceeding 400 words in length, for every 100 words.....	0 10
Attorney's fee additional.....	20 00
Counsel fee at enquête.....	10 00

## ON VOLUNTARY ASSIGNMENTS ;

To the prothonotary for filing and entering deed.....	2 00
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ON PETITIONS, OTHER THAN PETITIONS IN  
APPEAL, IN CONTESTATION OF PROCEED-  
INGS FOR COMPULSORY LIQUIDATION, OR  
FOR EXAMINATION OF DEBTOR:

To the petitioner's attorney on every petition, not contested	5 00
If contested, without enquête.....	10 00
If contested, with enquête.....	15 00
To the respondent's attorney—	
If contested, without enquête.....	8 00
If contested, with enquête.....	12 00
To the prothonotary—	
Filing petitions.....	2 00
Copy of order.....	0 50
If contested on filing contestation.....	2 00
If there be an enquête, for every deposition.....	0 30
For all words over 400 in any deposition, per 100.....	0 10

## ON PETITIONS IN APPEAL TO A JUDGE:

To the assignee for transcript of record and making up record and attendance before the judge.....	\$5 00
To the prothonotary—	
Filing petition.....	0 20
Remission of record.....	1 00
To the attorney for the petitioner—	
If not contested.....	10 00
If contested....	20 00
To the attorney for the respondent.....	15 00

ON PETITIONS FOR ORDER FOR EXAMINATION  
OF DEBTOR OR FOR OTHER PERSONS RES-  
PECTING THE ESTATE AND EFFECTS OF  
THE INSOLVENT:

To the petitioner's attorney.....	2 50
To the prothonotary, for order to serve.....	0 50

## ON CLAIMS.

To the attorneys—	
For every chirographic claim, without security.....	1 00
For every chirographic claim, with security .....	2 00
For every hypothecary claim, if not contested.....	5 00
To the assignee—	
On every chirographic claim and hypothecary claim, not contested.....	0 10

## ON CONTESTATION OF CLAIM;

*Without Enquête,*

To claimant's attorney.....	10 00
To contestant's attorney .....	10 00

*With Enquête, additional,*

To claimant's attorney.....	20 00
To contestant's attorney .....	20 00

## To the assignee—

For every witness examined on the contestation of a claim.....	\$0 25
On inscription of contestation for argument.....	2 00

## ON CONTESTATION OF DIVIDEND SHEETS:

The same fees and disbursements to counsel and to assignee as on contestation of claim.

## DISCHARGES.

On application for discharge by the Court, for confirmation of discharge, or for annulling discharge:

## To the applicant's attorney—

If not contested.....	15 00
If contested, without enquête.....	25 00
If contested, with enquête.....	35 00

## To the respondent's attorney—

If contested, without enquête.....	15 00
If contested, with enquête.....	25 00

## To the prothonotary—

Filing application.....	2 00
Every deposition.....	0 30
All words over 400 in each deposition, per 100.....	0 10

## MISCELLANEOUS.

To all the attorneys, prothonotaries and bailiffs, fees and disbursements on all rules, motions, copies of rules, judgments, and orders, commissions *rogatoires*, and other incidental matters, according to the same rates as are allowed by the present tariff in first-class actions in the superior court.

All necessary disbursements for advertisements and notices.



## IN ONTARIO.

*General Order of December, 1864, and Tariff of Fees for Insolvency Proceedings in Upper Canada. Promulgated by the Judges of the Superior Courts of Common Law, and of the Court of Chancery, under 27 and 28 Victoria, chap. 17.*

See sections 123 and 124 of Insolvent Act of 1875.

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WHEREAS it is provided by the Insolvent Act of 1864, amongst other things, that the judges of the Superior Courts of Common Law, and of the Court of Chancery in Upper Canada, or any of them, of whom the Chief Justice of Upper Canada, or the Chancellor, or the Chief Justice of the Common Pleas, shall be one, shall have power to fix and settle the costs, fees and charges which shall be had, taken or paid, in all cases and proceedings under the said Act, by or to attorneys, solicitors, counsel, officers of courts, whether for the officers or for the Crown, as a fee for the fee fund, or otherwise, sheriffs, assignees, or other persons, whom it may be necessary to provide for ;

And whereas the Chief Justice of Upper Canada, and the judges of the Superior Courts of Common Law and Equity, at Toronto, have assumed the duty so imposed upon them ;

In pursuance, therefore, of the power so contained in the Insolvent Act of 1864, the following table of costs has been framed by the Chief Justice and judges, and it is hereby declared, determined and adjudged, that all and singular the costs and fees mentioned in the said table, and no other or greater, shall be allowed on taxation, or taken or received, by any counsel or attorney, sheriff or officer, respectively, for any service rendered under the said Insolvent Act of 1864.

TORONTO, December 19, 1864.

## TARIFF.

*Fees to Solicitor or Attorney, as between party and party, and also as between Solicitor and Client.*

Instructions for voluntary assignment by debtor, or for compulsory liquidation, or for petition, where the Statute expressly requires a petition, or for brief, where matter is required to be argued by counsel, or is authorized by the judge to be argued by counsel, or for deeds, declarations, or proceedings on appeal.....	\$2 00
Drawing and engrossing petitions, deeds, affidavits, notices, advertisements, declarations, and all other necessary documents or papers when not otherwise expressly provided for, per folio of 100 words, or under.....	0 20
Making other copies when required.....	0 10
When more than five copies are required of any notice or other paper, five only to be charged for, unless the notice or paper is printed, and in that case printer's bill to be allowed in lieu of copies, drawing schedule, list, or notice of liabilities, per folio, when the number of creditors does not exceed twenty.....	0 20
When the number of creditors therein exceeds twenty, then for every folio of 100 words over twenty.....	0 10
Every common affidavit of service of papers, including attendance .....	0 50
Every common attendance.....	0 50
Every special attendance on judge.....	2 00
For every hour after the first.....	1 00
(To be increased by the judge in his discretion.)	
Every special attendance at meetings of creditors, or before assignee, acting as arbitrator .....	1 00
Fee on writ of attachment against estate and effects of insolvent, including attendance.....	2 00
Fees on rule of court or order of judge.....	1 00
Fee on <i>sub ad test.</i> , including attendances.....	1 00
Fee on <i>sub duces tecum</i> , including attendance .....	1 25

And, if above 4 folios, then for each additional folio, over such 4 folios .....	\$0 10
Fee on every other writ.....	1 00
Every necessary letter .....	0 50
Costs of preparing claim of creditors, and procuring same to be sworn to, and allowed at meeting of creditors, in ordinary case, where no dispute .....	1 00
Costs of solicitor of petitioning creditor, for examining claims filed up to appointment of assignee, for each claim so examined .....	0 50
Cost of assignee's solicitor for examining each claim required by assignee to be examined .....	0 50
Preparing for publication advertisements required by the Statute, including copies and all attendances in relation thereto .....	1 00
Preparing, engrossing, and procuring execution of bonds or other instruments of security .....	2 00
Mileage for the distance actually and necessarily travelled, per mile .....	0 10
Bill of costs ; engrossing, including copy for taxation, per folio .....	0 20
Copy for the opposite party .....	0 50
Taxation of costs .....	0 50

No allowance to be made for unnecessary documents or papers, or for unnecessary matter in necessary documents or papers, or for unnecessary length of proceedings of any kind. In case of any proceedings not provided for by this tariff, the charges to be the same as for like proceedings, as in the tariffs of the superior courts.

#### COUNSEL.

Fee on arguments, examinations, and advising proceedings, to be allowed and fixed by the judge as shall appear to him proper under the circumstances of the case.

#### FEE FUND.

Enery warrant issued against estate and effects of insolvent debtors .....	\$1 00
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# TARIFF OF FEES.

421

Every other warrant or writ.....	\$0 30
Every summary rule, order or fiat.....	0 30
Every meeting of creditors before judge.....	0 50
If more than an hour .....	1 00
If more than one on same day, \$2.00 to be apportioned amongst all.	
Every affidavit administered before judge.....	0 20
Every certificate of proceedings by judge of county court for transmission to a superior court or judge thereof..	0 50
Ever bankrupt's certificate.....	1 00
Every taxation of costs... ..	0 15

# FEES TO CLERK.

Every writ, or rule, or order.....	0 50
Filing every affidavit or proceeding.....	0 10
Swearing affidavit.....	0 20
Copies of all proceedings of which copy bespoken or re- quired, per folio of 100 words .....	0 10
Every certificate.....	0 30
Taxing costs.....	0 50
Taxing costs and giving allocatur .....	0 65
For every sitting under commission, per day.....	1 00
If more than one on same day, \$2.00 to be apportioned amongst all.	
Fee for keeping record of proceedings in each case.....	1 00
For any list of debtors proved at first meeting, (if made)...	0 50
For any list of debtors at second meeting .....	0 50
Any search....	0 20
A general search relating to one bankruptcy, or the bank- ruptcy of one person or firm.....	0 50

# SHERIFF.

Same as on corresponding proceedings in superior courts.

# WITNESSES.

Same as in superior courts.

## RULES OF PRACTICE, NOVA SCOTIA.

No special rules of practice in Insolvency, have been laid down by the Judges in Nova Scotia.

It is ordered that the Commissioners for taking affidavits in this Court, appointed by the Governor in Council, under the authority of the Revised Statutes, be and they are hereby appointed Commissioners within their respective counties, for taking affidavits to be sworn in proceedings in insolvency, pursuant to said Act.

By the Court,  
J. W. NUTTING, Proth'y.

27th December, 1869.

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TARIFF OF FEES IN INSOLVENCY IN THE PROVINCE OF NOVA SCOTIA.

INSOLVENT ACT, 1869.

It is ordered, under and by virtue of the 32 and 33 Vict. chap. 16, intituled: "An Act respecting Insolvency," section 139, that until further direction therein, the same costs, fees, and charges, shall or may be had, taken, or paid by and to Judges of Probate, Counsel, Attorneys, Solicitors, and Sheriffs, as are now payable to and taken by them in the Supreme Court and Court of Probate in this Province, under and by virtue of the Acts in that behalf.

HALIFAX, 13th September, 1869.

(Signed) W. YOUNG.  
J. W. JOHNSTON.  
W. F. DESBARRES.  
L. M. WILKINS.

I, JAMES WALTON NUTTING, of the City of Halifax, in the Province of Nova Scotia, prothonotary in and for the County of Halifax, of the Supreme Court of said Province, do hereby cer-

tify that the foregoing paper writing, headed "Insolvent Act, 1869," contains a true copy of an order made by the chief justice and assistant judges of said Court, whose names are thereunto subscribed, regulating the costs and fees to be charged in said Province under said Act.

(Signed) J. W. NUTTING, Proth'y.

HALIFAX, 29th October, A.D., 1869.

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The fees of the Judge of Probate for his services in Insolvency were fixed by an order of the Judges of the Supreme Court in September, 1870, and are as follows :

Where the value of the insolvent estate does not exceed \$800, and the judge has been called upon therein. In full of all fees .....	\$6 00
In cases beyond that value.	
Every warrant or attachment, including order therefor ...	1 00
Every order confirming or annulling discharge of insolvent, and the hearing thereon .....	5 00
Signing every other order .....	0 40
Administering every oath .....	0 20
Testimony taken by the judge in writing, per folio .....	0 20
Attending every meeting of creditors .....	1 00
If more than one hour, for every subsequent hour .....	1 00
..... Not to exceed in any one day	5 00
Attending personal examination of insolvent .....	5 00
Every hearing under sections 15 and 26 .....	5 00
Transmitting appeal with statement of decision .....	5 00
Examining and taxing costs .....	0 50

The fees allowed to registrars, proctors, advocates, &c., are the same as in the Probate Court. These will be found in full in the Revised Statutes of Nova Scotia, Fourth Series, pages 618, 619, and 620.

## REGISTRAR'S FEES.

Where the estate does not exceed \$400, in full of all fees..	\$4 00
Over \$400—\$800 .....	6 00
For filing every paper.....	0 07
Probate of will and letters of administration and entry of order therefor, where estate is under \$800 .....	3 50
Above \$800 and less than \$4000, and entry of order therefor .....	9 50
Letters of guardianship or <i>ad colligendum</i> , and entry of order.....	2 00
Copy of will and probate, per folio .....	0 10
For preparing bond in all necessary cases .....	0 80
Preparing citation and seal .....	0 40
Each copy thereof .....	0 20
Preparing necessary affidavits, each.....	0 20
Filing every warrant and seal .....	0 50
Filing every certificate of license to sell real estate.....	1 00
For all copies of papers, per folio .....	0 10
For every certificate and <i>Dedimus potestatem</i> .....	1 00
For entry of every decree in registry book, and of every order not specially provided for, per folio .....	0 10
Every search or inspection of documents .....	0 20
Preparing subpoena and seal .....	0 40
Filing each ticket for the same .....	0 10
Filing every appeal or <i>caveat</i> .....	0 40
Preparing every execution, attachment, or other process not specially provided for, and entry of order there- for .....	0 40
Filing every decree .....	2 00
Every oath administered by him.....	0 20
Taxing costs .....	0 50

## PROCTOR AND ADVOCATE.

Taking instructions for client to commence or defend pro- ceedings in probate court .....	2 00
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# TARIFF OF FEES.

425

Preparing every petition.....	\$1 00
Preparing every allegation or other paper necessary to be prepared by him, including accounts, per folio.....	0 20
Every additional copy thereof, per folio.....	0 10
Every necessary attendance on judge.....	1 50
Every hearing or argument before the judge, not less than two dollars and fifty cents, nor more than ten dollars, at the discretion of the judge	
Serving every notice or other paper on each person .....	0 20

## SHERIFF OR OTHER MINISTERIAL OFFIC

Serving citation or other process (subpœna excepted) on each person.....	0 50
Posting up the same in three public places directed by the judge .....	1 00
Serving subpœna on each person .....	0 20
Travelling fees, per mile.....	0 10

## APPRAISERS' FEES.

Eor appraising the estate of a deceased person, not to exceed, for each day he shall be actually employed .....	2 00
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## TARIFF OF FEES IN NEW BRUNSWICK.

In pursuance of the power given by "The Insolvent Act of 1869," the following table of fees and charges has been fixed and settled by the chief justice and judges of the Supreme Court of New Brunswick, to be taken and paid in all cases and proceedings under the said Act, by or to attorneys, solicitors, counsel, and officers of courts, for any services rendered under the said Insolvent Act, and no other or greater shall be allowed on taxation.



**FEEES TO SOLICITOR OR ATTORNEY AS BETWEEN  
PARTY AND PARTY, AND ALSO AS BETWEEN  
ATTORNEY AND CLIENT.**

Instructions for voluntary assignment or compulsory liquidation, or for petition, or brief, when matter is required to be argued by counsel, or for proceedings on appeal.....	\$2 00
Drawing and engrossing all proceedings, notices, &c., per folio .....	0 20
Copies thereof, when required or necessary.....	0 10
Every common attendance on judge.....	0 50
Every special attendance on judge.. .....	2 00
Every special attendance at meeting of creditors, or before assignee .....	1 00
Fee on writ of attachment against insolvent, including attendance.....	2 00
Every rule of court or order of judge, including attendance .....	1 00
Fee on every other writ.....	1 00
Every necessary letter .... ..	0 50
Costs of preparing claim of creditor, procuring the same to be sworn to and allowed at meeting of creditors, in ordinary cases where no dispute....	1 00
Attorney of petitioning creditor, for examining claims filed up to appointment of assignee, for each claim .....	0 50
Assignee's attorney, examining each claim required by assignee to be examined .....	0 50
Preparing for publication advertisements required by Act, including copies and attendance in relation thereto...	1 00
Preparing, engrossing and procuring execution of bonds or other securities .....	2 00
Mileage actually and necessarily travelled (if beyond the county in which the attorney resides) per mile.....	0 10
Bill of costs, engrossing, including copy for taxation, per folio .....	0 20

# TARIFF OF FEES.

427

Copy for the opposite party .....	\$0 50.
Attending taxation of costs .....	0 50.
Copy of taxed costs to be filed with the clerk .....	0 50.

No allowance made for unnecessary documents or papers or unnecessary prolixity in the same. For all other necessary proceedings, not provided for in this scale of fees, the charges to be the same as for like proceedings in the Supreme Court.

## TO THE CLERK OF THE COUNTY COURT.

Signing every writ, rule or order.....	0 50
Filing and entering deed of assignment, record of appointment or attachment .....	1 00
Filing every other paper.....	0 10
Reading every paper in court .....	0 10
Swearing affidavit or administering oath.....	0 20
Copy of all proceedings furnished, per folio of 100 words..	0 10
Certificate under seal of the court .....	0 60
Every other necessary certificate.....	0 30
Every meeting of creditors held before the clerk.....	1 00
For keeping record of proceedings in each case.....	1 00
Every search .....	0 20
General search on one day relating to one case or firm.....	0 50
For taking minutes of evidence before the judge when required, per folio.....	0 10
Copy of minute of evidence for Supreme Court or judge thereof on appeal, to be paid by appellant, per folio ..	0 10
For scheduling and filing all papers from assignee after discharge.....	1 50

For all other services not included in the above scale, to be allowed the same rates as are allowed for like services in the county courts of New Brunswick.

## COUNSEL.

Fees on arguments and examinations before judge, to be allowed and fixed by the judge, as shall appear to him proper under the circumstances of the case, not exceeding twenty dollars.

## TO THE INTERIM ASSIGNEE, ASSIGNEE OR GUARDIAN.

Drawing affidavit, notice, advertisement, and all other necessary documents or papers, per folio.....	\$0 20
Making other copies when required, per folio.....	0 10
When more than five copies are required of any notices, five only to be charged for, unless the notice is printed, and in that case printer's bill to be allowed in lieu of copies.	
For every witness examined before him.....	0 25
Mileage for the distance actually and necessarily travelled, per mile .....	0 10
For calling first meeting of creditors and attending thereat	4 00
For attending meeting of creditors, other than first, and keeping minutes .....	3 00
Attending at clerk's office, and writing duplicate record, per folio .....	0 20
Guardian, per day.....	1 00

## SHERIFF

The same fees as on corresponding proceedings in the Supreme Court.

## WITNESSES' FEES.

The same fees as are allowed in the Supreme Court.

All postages and printers' bill to be added.

The foregoing fees and charges shall, in each and every case, be taxed by the judge, and together with the commission provided for by the Act, shall constitute all charges to be made for any services rendered under the said Act; and a copy of the bill of costs so taxed shall in all cases be filed with the clerk immediately after such taxation.

All papers relating to any insolvency after the discharge of the assignee, and the allowance or disallowance of the certificate to the insolvent, shall be filed with the clerk of the court, and kept among the records thereof.

A copy of this tariff of fees shall be kept at all times posted up in a conspicuous place in the offices of the clerks and assignees respectively.

W. J. RITCHIE,  
JOHN C. ALLEN,  
J. W. WELDON,  
CHARLES FISHER,  
A. R. WETMORE.

20th August, 1870.

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### IN PRINCE EDWARD ISLAND

No special rules of practice have been made. The following is the general order of September, 1875, and table of fees for insolvency proceedings, of the Province of Prince Edward Island; promulgated by the Judges of the Supreme Court of Judicature, under "The Insolvent Act of 1875."

In pursuance of the powers contained in and given to us by "The Insolvent Act of 1875," passed by the Parliament of the Dominion of Canada in its last session, the following table of costs has been framed by the undersigned, being a majority of the judges of the said Province of Prince Edward Island, and it is hereby declared, determined and adjudged, that all and singular the costs and fees mentioned in the said table, and no other or greater shall, until further order, be allowed on taxation or taken or received by any counsel or attorney, sheriff or officers, or other person, respectively, for any services rendered under the said Insolvent Act of 1875:—

### FEES TO ATTORNEY OR SOLICITOR.

Instructions, including retainer for assignment by debtor,  
or for compulsory liquidation, or for petition where  
the Statute requires a petition..... \$2 50

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1. Instructions for brief where matter is to be argued by counsel, or is authorized by the judge to be argued by counsel, or for deeds or declarations or proceedings on appeal..... \$1 50
2. Drawing and engrossing deeds, petitions, affidavits, declarations, demands, and all other necessary documents and papers when not otherwise expressly provided for, per folio of 100 words or under..... 0 16
3. Making other copies when required..... 0 8  
When more than five copies are required of any notice or other paper five only to be charged for, unless the notice or paper is printed, and in that case printer's bills to be allowed instead of copies.
4. Drawing schedule list or notice of liabilities per folio, when the number of creditors does not exceed twenty 0 16
5. When the number of creditors exceeds twenty, then for every folio of 100 words over twenty folios..... 0 8
6. Every common affidavit of service of papers including attendance and copy..... 0 50
7. Every common attendance..... 0 50
8. Every special attendance on judge..... 1 00
9. Every special attendance at meeting of creditors or before assignee, if required in opinion of the judge on taxation..... 1 00
10. Fee on issuing writ of attachment against estate and effects of insolvent, including attendances ..... 1 50
11. Fee on rule of Court or order of judge..... 1 00
12. Fee on *subpœna ad test.* including attendance..... 0 60
13. Fee on *sub. duces tecum* including attendance..... 0 75
14. Fee on every other writ..... 0 75
15. Every necessary letter..... 0 50
16. Cost of preparing claim of creditors and procuring same, to be sworn to and allowed at meeting of creditors, or otherwise, in ordinary cases, where no dispute ..... 1 00
17. Costs of solicitor of petitioning creditor, for examining claims filed, up to appointment of assignee, not less than one dollar or more than three dollars at discretion of judge..... 3 00

18. Cost of assignee's solicitor for examining claims required by assignee, to be examined same as in last item, No. 17.	
19. Preparing for publication advertisements required by the Statute, including copies and all attendances in relation thereto.....	1 00
20. Preparing, engrossing and procuring execution of bonds or other instruments of security.....	2 00
21. Bill of costs, engrossing, including copy for taxation per folio.....	0 16
22. Copy for other necessary opposite party, in all.....	0 50
23. Taxation of costs including attendance.....	0 50

## FEES TO CLERK.

Every writ.....	0 50
Every rule or order.....	0 36
Filing every affidavit or proceeding.....	0 10
Swearing affidavit.....	0 16
Copies of all proceedings of which copies bespoken and required, per folio of 100 words.....	0 08
Every certificate.....	0 25
For every sitting under commission per day.....	1 00
If more than one on same day, two dollars; to be apportioned amongst all.....	2 00
Fee for keeping record of proceedings in each insolvent case.....	1 00
For any list of creditors proved at 1st meeting, if bespoken and made.....	0 50
For any list of creditors proved at 2nd meeting, if bespoken and made.....	0 50
Any search.....	0 16
A general search relating to one bankruptcy or the bankruptcy of one person or firm.....	0 50

## COUNSEL.

Fee on arguments and examinations and hearings, to be allowed and fixed by the judge as shall appear to him proper under the circumstances of the case.

## WITNESSES,

Same as in Supreme Court.

## SHERIFF AND CONSTABLES,

Same as on corresponding proceedings in Supreme Court.

No allowance to be made for unnecessary documents or papers, or for unnecessary matter in necessary documents or papers, or for unnecessary length of proceedings of any kind. In case of any proceedings not provided for by this table, the charges to be allowed or disallowed at the discretion of the judge; but in no case to exceed the charges allowable as for like proceedings in the Supreme Court.

EDWARD PALMER, Chief Justice.

JOSEPH HENSLEY, Assistant Judge.

Charlottetown, 1st September, 1875.

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## OFFICIAL ASSIGNEES.

## PROVINCE OF ONTARIO.

25TH APRIL, 1877.

Assignee.	Residence.	County.
John Davidson	Silver Islet	District Algoma.
Richard Carney	Sault Ste. Marie	do
Thomas Botham	Brantford	Brant.
George Gould	Walkerton	Bruce.
Paul McInnis	Teeswater	do
Wm. M. Smith	Walkerton	do
Wm. Fingland	Ottawa	Carleton, including Ottawa
Francis Clemow	do	do do
Daniel S. Eastwood	do	do do
Sylvester Kenyon Mathews	Morrisburg	Dundas.
Wm. Thompson	Bowmanville	Durham.
Seth S. Smith	Port Hope	do
Colin Munro	St. Thomas	Elgin.
John McCrae	Windsor	Essex.
Cornelius Vallean Price	Kingston	Frontenac, including Kingston.
Donald McLellan	Williamstown	Glengarry.
George Price	Owen Sound	Grey.
John Easton	Prescott	Grenville.
Eleazer H. Whitmarsh	Merrickville	do
Frederick Geo. A. Henderson	Cayuga	Haldimand.
David Watson Campbell	Milton	Halton.
Marshall B. Roblin	Belleville	Hastings.
John Parker Thomas	do	do
Robert Gibbons	Goderich	Huron.
Samuel E. McCaughey	Seaforth	do
Hugh Francis Cumming	Chatham	Kent.
Harry Black	do	do
Wm. T. Keays	Sarnia	Lambton.
James Flintoft, junior	do	do
John A. Gemmill	Almonte	Lanark.
A. W. Bell	Carleton Place	do
John Norman Abbott	Brockville	Leeds.
Norton Marshall	do	do
Walter S. Williams	Napanee	Lennox and Addington.
Wm. Fletcher Hall	do	do
Edward Andrew Deroche	do	do
James McEdward	St. Catharines	Lincoln.
Hy. Nicholson	Strathroy	Middlesex.
Henry E. Nelles	London	do including London.
Thomas Churcher	do	do do



## PROVINCE OF ONTARIO.—Continued.

Assignee.	Residence.	County.
Thomas M. Bowerman.....	Bracebridge .....	Muskoka County or District.
Do .....	do .....	Parry Sound and Nipissing Dist.
Augustine J. Donly .....	Simcoe .....	Norfolk.
Addison Vars .....	Colborne .....	Northumberland.
Edmund Alex. MacaNehtan .....	Cobourg .....	do
John S. M. Willcox .....	Whitby .....	Ontario.
Anson T. Button .....	Uxbridge .....	do
James Melvin Wilson .....	Ingersoll .....	Oxford.
George Perry .....	Woodstock .....	do
James McWhirter .....	do .....	do
James Wm. Main .....	Brampton .....	Peel.
John Hossie .....	Stratford .....	Perth.
Thomas Miller .....	do .....	do
James A. Hall .....	Peterborough .....	Peterborough.
James Pendleton Wells .....	Vankleek Hill .....	Prescott.
Wm. Carter .....	Pictou .....	Prince Edward.
John D. MacDonald .....	Renfrew .....	Renfrew.
George Pearson .....	Eganville .....	do
Alfred J. Fortier .....	Pembroke .....	do
James Bell .....	Arnprior .....	do
Peter McLaren .....	Osborne .....	Russell.
A. J. Alport .....	Orillia .....	Simcoe.
Thomas Goffatt, junior .....	do .....	do
Joseph Rogers .....	Barrie .....	do
Thomas D. McConkey .....	do .....	do
Samuel Driffell .....	Bradford .....	do
Theophilus Robert Earl .....	Collingwood .....	do
Donald McDonell .....	Cornwall .....	Stormont.
Robert McFarlane .....	do .....	do
George Kempt .....	Lindsay .....	Victoria.
Alexander McGregor .....	Galt .....	Waterloo.
Menno Eby .....	Berlin .....	do
Fletcher Swayze .....	Welland .....	Welland.
Joseph Shaw .....	Orangeville .....	Wellington.
John Smith .....	Elora .....	do
Alex. Davidson .....	Hamilton .....	Wentworth, including Hamilton.
Ralph Leeming Gunn .....	do .....	do
Alex. Innes McKenzie .....	do .....	do
Fred. D. Suter .....	Dundas .....	do
Wm. Thomas Mason .....	Toronto .....	York, which includes Toronto.
James B. Boustead .....	do .....	do
Wm. Anderson .....	do .....	do
John Kerr .....	do .....	do
Wm. F. Munro .....	do .....	do
Robert Hall Smith .....	Newmarket .....	do

## PROVINCE OF QUEBEC.

25TH APRIL, 1877.

Assignee.	Residence.	Judicial or Electoral District for which Appointment is made.	
Siméon Fraser	L'Avenir	Judicial District, Arthabaska.	
Octave Onellet	Somerset	do	do
Louis Rainville	St. Christopher	do	do
Daniel Doran	St. Joseph de la Beauce	do	Beauce.
Elie Louis Normanden	Ormatown	do	Beauharnois.
Peter Cowan	Nelsonville	do	Bedford.
Thomas Brassard	Waterloo	do	do
Jean Alfred Gagne	Chicoutimi	do	Chicoutimi.
Charles A. Lebel	New Carlisle	do	Gaspé.
Alphonse Dumais	Bassin de Gaspé	do	do
Louis A. Anger	St. Gregorie d'Iberville	do	Iberville.
Adolphe Magnan	Joliette	do	Joliette.
J. Elizear Pouliot	Fraserville	do	Kamouraska.
Alfred Lemieux	Levis	do	Levis.
Do	do	do	Lotbinière.
Thadée S. Michaud	St. Jean Port Joli.	do	Montmagny.
François Xavier Talbot	Montmagny	do	do
Cheophas Beausoleil	Montreal	Judicial District, Montreal, except Montreal East, Montreal West and Montreal Centre.	
Louis Joseph Lajoie	do	Electoral Districts, Montreal East, Montreal West, and Montreal Centre.	
James Court	do	do	do
Arthur Perkins	do	do	do
William Rhind	do	do	do
Alphonse Doutre	do	do	do
Thomas Darling	do	do	do
Andrew Buchanan Stewart	do	do	do
Olivier Lecours	do	do	do
John Fair	do	do	do
David Craig	do	do	do
Louis Dupuy	do	do	do
John White	do	do	do
Edward Evans	do	do	do
F. Samuel Mackay	Papineauville	Judicial District, Ottawa.	
Alex. Bourgeau	Aylmer	do	do
D. C. Simon	Hull	do	do
Louis M. Couttee	Aylmer	do	do
William Walker	Quebec	Judicial District, Quebec, except Levis and Lotbinière.	
Richard Henry Wurtele	do	do	do
Owen Murphy	do	do	do
Odilon Roy	do	do	do
Jacques Anger	do	do	do
Adolphe Germain	Sorel	Judicial District, Richelieu.	
Victor Gladu	St. François du Lac	do	do
A. Evariste Brassard	Sorel	do	do
Elezeaz Côté	Ste. Luce	do	Rimouski.

PROVINCE OF QUEBEC.—*Continued.*

Assignee.	Residence.	Judicial or Electoral District for which Appointment is made.
William Brooke .....	Richmond .....	Electoral District, Richmond and Wolfe.
H. C. H. Chagnon .....	Coaticooke .....	Electoral District, Stanstead.
Israel Wood .....	Stanstead .....	do do
Joseph A. Archambault .....	Sherbrooke .....	Judicial District, St. Francis, excepting thereout Stanstead and Richmond and Wolfe.
Galen B. Loomis .....	do .....	do do
Charles J. L. Bacon .....	do .....	do do
Elie Anger .....	Murray Bay .....	Judicial District, Saguenay.
Michel Esdras Bernier .....	St. Hyacinthe .....	do St. Hyacinthe.
François Xavier Lambert .....	Rivière du Loup .....	do Three Rivers.
Gavin Walker .....	Lachute .....	do Terrebonne.
Octave Forget .....	Terrebonne .....	do do
Charles D. Hébert .....	Yamachiche .....	do Three Rivers.
Adolphe Adilon Houle .....	St. Celestin .....	do do
Jean Baptiste Onésime Dumont .....	Three Rivers .....	do do

## NOVA SCOTIA.

25TH APRIL, 1877.

Assignee.	Residence.	County.
Richard John Uniacke .....	Annapolis .....	Annapolis.
Archibald McGillivray .....	Antigonish .....	Antigonish.
Charles W. Hill .....	Sydney, C.B. ....	Cape Breton.
James K. Blair .....	Truro .....	Colchester.
Barry Baker .....	Amherst .....	Cumberland.
George Henderson .....	Digby .....	Digby.
Samuel M. D. Cumming .....	Sherbrooke .....	Guysborough.
William Hartshorn .....	Guysborough .....	Guysborough.
William Creighton .....	Halifax .....	Halifax, including the City of Halifax.
Thomas Aylward .....	Windsor .....	Hants.
James McKeen .....	Port Hastings .....	Inverness.
Edmund J. Cogswell .....	Kemptville .....	King's.
Henry S. Jost .....	Lunenburg .....	Lunenburg.
W. G. Glennie .....	Pictou .....	Pictou.
William Ford .....	Milton .....	Queen's.
John H. Rendress .....	Arichat .....	Richmond.
Charles Hood .....	Shelburne .....	Shelburne.
A. Taylor .....	Baddeck .....	Victoria.
Stephen B. Murray .....	Yarmouth .....	Yarmouth.

## PROVINCE OF NEW BRUNSWICK.

25TH APRIL, 1877.

Assignee.	Residence.	County.
George Calhoun .....	Hopewell Cape.....	Albert.
Daniel C. Courser .....	Woodstock .....	Carleton.
George Frederick Hill .....	St. Stephen .....	Charlotte.
Ezekiel McLeod .....	St. John.....	City and County of St. John.
Robert Ellis, junior .....	Bathurst .....	Gloucester.
James McDougall .....	Richibucto .....	Kent.
John Elias Bleakeney McCready .....	Cardwell .....	King's.
John Ellis .....	Newcastle .....	Northumberland.
Cabel F. Fox .....	Gagetown .....	Queen's.
William S. Smith .....	Dalhousie .....	Restigouche.
George Bliss Seely .....	Fredericton .....	Sunbury.
Peter O'Byram .....	Grand Falls .....	Victoria.
John McKenzie .....	Moncton .....	Westmoreland.
E. Byron Winslow .....	Fredericton .....	York.

## PRINCE EDWARD ISLAND.

25TH APRIL, 1877.

Assignee.	Residence.	County.
Roderick Munro .....	Georgetown .....	King's.
David Montgomery .....	Summerside .....	Prince.
Benjamin Wilson Higgs .....	Charlottetown .....	Queen's.

## MANITOBA.

25TH APRIL, 1877.

Assignee.	Residence.	County.
Samuel R. Marlutt .....	Portage LaPrairie.	East Marquette.
Do .....	do .....	West do
Robert Strange .....	Winnipeg .....	Provencher.
John Balsillie .....	do .....	Selkirk, including Town of Win-
George Kennedy .....	do .....	nipeg.
		Lisgar.

## THE INSOLVENT ACT.

## BRITISH COLUMBIA.

25TH APRIL, 1877.

Assignee.	Residence.	District.
Charles Dupont .....	Victoria .....	For Province B. C.
James Morrison .....	New Westminster.	do
George Byrnes .....	Cariboo .....	do

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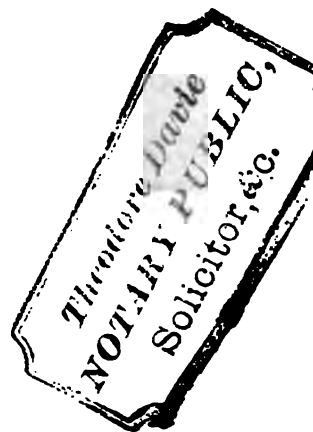
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## ADDENDA.

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A DEFENDANT in an action who assigns under the Insolvent Act, may still carry on the proceedings in his own name, and may procure a dismissal of the plaintiff's action. The only effect of the assignment is, that he may be called upon to give security for costs, under the 39th section of the Act (*Morin v. Henderson*, 21 L. C. J. 83 ; see pages 149-51).

In the Province of Quebec, an appeal under the 128th section of the Act lies only in the case of final judgment (*MacKay v. St. Lawrence S. F. Co.*, 21 L. C. J. 76 ; see pages 305-6).

In proving a claim, sums received by the claimant on account of the claim *before proof*, must be deducted from the claim ; but sums received *after proof* need not be deducted, provided the claimant does not receive, in all, more than one hundred cents on the dollar. Thus, the holder of negotiable paper, the maker and indorser of which have both become insolvent, and who has received a dividend from one of them *before* proving his claim against the other, cannot prove his claim against the estate of the other for the full amount mentioned in the paper, on the contrary, he must deduct the amount of the dividend received from the estate of the other party. But, if after proof dividends are received from the estate of another party, the creditor is, nevertheless, entitled to dividends upon the whole amount proved, provided the dividends do not exceed one hundred cents on the dollar on the balance really due (re *Rochette*, 3 Quebec Law Reps. 97 ; see also pages 238-9).











